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Expulsion of aliens

Memorandum by the Secretariat

Summary

The present study was prepared to assist the International Law Commission in the consideration of the topic of the expulsion of aliens. The study endeavours to provide a comprehensive analysis of the possible issues which may require consideration in the context of the present topic. It further provides an analytical summary of the relevant legal materials contained in treaty law, international jurisprudence, other international documents, national legislation and national jurisprudence. It surveys relevant materials adopted at the international level, the regional level as well as the national level. It also reproduces the relevant extracts of the various legal materials for ease of reference.

The study is based on the premise that every State has the right to expel aliens. However, this right is subject to general limitations as well as specific substantive and procedural requirements. Traditionally, the right of expulsion was subject to general limitations such as the prohibition of abuse of rights, the principle of good faith, the prohibition of arbitrariness and standards relating to the treatment of aliens. Contemporary international human rights law has had a significant impact on the law relating to the expulsion of aliens in terms of the development of more specific substantive and procedural requirements. Recent trends in national law and practice with respect to the expulsion of aliens suspected of involvement in international terrorism may raise issues with respect to compliance with these requirements.

The study approaches the topic first from the perspective of the expulsion of aliens in general in relation to the grounds and other considerations relating to the decision to expel an alien, the procedural requirements for the expulsion of an alien, and the implementation of the decision to expel an alien by means of voluntary departure or deportation. The study then turns to the special considerations that may apply to the expulsion of specific categories of aliens, such as illegal aliens, resident aliens, migrant workers, minor children, refugees and stateless persons. The study also

addresses questions relating to the deprivation of nationality and the expulsion of former nationals as aliens. The expulsion of enemy aliens who are nationals of an opposing State during an armed conflict is considered under the relevant *jus in bello*, including international humanitarian law, as well as the human rights standards for the expulsion of aliens which continue to apply in armed conflict. At the conclusion of the consideration of the expulsion of individual aliens, the study provides a brief overview of the possible forms of reparation for unlawful expulsion based on State practice.

The study then turns to the question of the collective expulsion and the mass expulsion of aliens. The individual expulsion, the collective expulsion and the mass expulsion of aliens may be viewed as being governed by separate legal regimes and are treated as such for purposes of the present study. A State has a broad discretionary right to expel aliens from its territory when their continuing presence is contrary to its interests subject to certain limitations and requirements. In contrast, the collective expulsion of a group of aliens *as such* (even a small group) is contrary to the very notion of the human rights of individuals and is therefore prohibited. The collective expulsion of a group of aliens does not take into account the consequences of the presence, the grounds and other factors affecting the expulsion, the procedural requirements for the expulsion or the rules relating to the implementation of the expulsion decision with respect to a single one of these aliens. The decision concerning expulsion is made with respect to the group of aliens as a whole. Mass expulsion involves the expulsion of a large number of aliens within a relatively short period of time. Mass expulsion may be viewed as an abuse of the right of expulsion and as imposing an excessive burden on the receiving State. Mass expulsion is prohibited except in very exceptional circumstances involving a change in the territory of a State or armed conflict. Even in such cases, the expulsion of a large number of aliens must comply with the general limitations as well as the substantive and procedural requirements for the expulsion of individual aliens to the extent possible under these exceptional circumstances. The collective expulsion or the mass expulsion of aliens may also violate the principle of non-discrimination and therefore constitute an additional violation of international law or an aggravated form of the prohibition of collective expulsion or mass expulsion.

The study consists of Parts I to XII as well as Annexes I and II. General aspects of the study are addressed in Parts I and II. Part I provides a general introduction to the topic of the expulsion of aliens. Part II provides general background information concerning the increasing phenomenon of international migration on a global level in order to facilitate the consideration of the present topic in the light of the contemporary situation and challenges with respect to the presence of aliens in the territory of States.

Part III addresses the scope of the topic which raises a number of important issues such as whether the Commission should consider: (1) the special rules that may apply to specific categories of aliens; (2) the similar measures that may be taken by States to compel the departure of aliens; (3) the expulsion of aliens in time of armed conflict; and (4) the collective expulsion and the mass expulsion of aliens.

Part IV draws attention to the potential relevance of a number of terms for purposes of the consideration of the present topic. Some of these terms relate to the notion of "alien" and specific categories of aliens, including: illegal alien, resident alien, migrant worker, family, refugee, asylee, asylum seeker, stateless person, former national and enemy alien. The other terms relate to the action taken by a State to compel the departure of an alien. The paper suggests a functional approach to the notion of “expulsion” notwithstanding the different terms that may be used in national legal systems for measures which perform the same function. The paper also suggests distinguishing between the expulsion of an alien in terms of the decision to expel and the implementation of the decision by means of voluntary departure or deportation. National legal systems vary in the use of the terms “expulsion” and “deportation”. The two terms are used for purposes of the present study to facilitate the consideration of the substantive and procedural requirements that apply to the expulsion of an alien and the implementation of the decision to expel.

Parts V to IX address the right of a State to expel an alien from its territory, the general limitations on the right of expulsion under traditional and contemporary international law as well as the more specific substantive and procedural requirements concerning the grounds and other considerations relating to the decision to expel an alien, the procedural requirements for the expulsion of an alien, and the implementation of the expulsion decision by voluntary means or deportation.

Part X deals with the special considerations that may apply to the expulsion of specific categories of aliens, such as illegal aliens, resident aliens, migrant workers, minor children, refugees, stateless persons, former nationals and enemy aliens in time of armed conflict.

Part XI briefly discusses the possible forms of reparation for the unlawful expulsion of aliens based on State practice, including restitution, compensation and satisfaction. It also briefly discusses issues relating to the burden of proof in such cases.

Part XII provides a general overview of the issues and relevant materials relating to the collective expulsion and the mass expulsion of aliens in contrast to the expulsion of one or more individual aliens to facilitate the decision as to whether such expulsions should be included within the scope of the present topic. Given the significant differences in the legal regimes governing individual expulsions, collective expulsions and mass expulsions, the Commission may wish to consider addressing them in separate parts or chapters of its work if it decides to undertake these aspects of the topic.

Annex I contains an extensive selected bibliography of the relevant materials that were used in the preparation of the study, including: treaties and similar documents; international jurisprudence; the practice of international organizations, regional organizations and treaty-monitoring bodies; the national laws of States; the national jurisprudence of States; literature; and reports of non-governmental organizations.

Annex II provides a list of the abbreviations for the national laws of various States which are cited throughout the study.

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I. INTRODUCTION

1. The present study was prepared by the Secretariat at the request of the International Law Commission.[1] This study endeavours to provide a comprehensive analysis of the possible issues which may require consideration in the context of the present topic. It further provides an analytical summary of the relevant legal materials contained in treaty law, international jurisprudence, other international documents, national legislation and national jurisprudence. It also reproduces the relevant extracts of the various legal materials for ease of reference.

2. The expulsion of aliens is a topic which lies at the crossroads of a number of fields of international law, including territorial sovereignty; nationality; immigration; treatment of aliens; migrant workers; refugees; stateless persons; human rights; and the rights of the family and children. The expulsion of aliens in time of armed conflict also requires consideration *jus in bello,* including international humanitarian law and human rights law. The challenge in addressing the present topic is to consider the relevant rules drawn from various fields of international law with a view to examining the possibility of elaborating a coherent set of rules governing the essential aspects of the expulsion of aliens under contemporary international law.

3. In this regard, it may be particularly important to take into account the relevant practice of a number of international organizations, including regional organizations, and other organs and treaty-monitoring bodies which deal with certain aspects of the expulsion of aliens, such as the United Nations High Commissioner for Refugees, the United Nations High Commissioner for Human Rights, the United Nations Commission on Human Rights, the Human Rights Committee, the Committee on the Rights of the Child, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the International Labour Organization, the International Organization for Migration, the Council of Europe, the European Court of Human Rights, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the European Union, the Court of Justice of the European Communities, the Organization of American States, the Central American Court of Human Rights, the Inter-American Commission on Human Rights, the African Union and the African Commission on Human and Peoples' Rights. This list is not intended to be exhaustive.

4. The expulsion of aliens is a topic which has been addressed to some extent in various conventions including regional and bilateral agreements. These treaties deal with certain aspects of the expulsion of aliens from varying perspectives. There is no single international instrument which provides a comprehensive regulation of all aspects of the topic.

5. The expulsion of aliens is a topic which by its very nature has also been addressed by States in their national legislation, judicial decisions or administrative decisions. The collection of national

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[1] Report of the International Law Commission, Fifty-seventh Session, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 250.

materials for the study presented particular challenges. The Secretariat received relevant national legislation from a few States. In most instances, however, the Secretariat has collected national legislation and judicial materials from secondary sources in an effort to reflect the views and practice of States representing different legal systems and different regions of the world. In this regard, the Secretariat has reviewed the laws of 49 States and the national jurisprudence of 39 States. The study reflects the national laws or jurisprudence of almost 70 States. It was often not possible to verify that the collected materials were comprehensive and had not been subsequently amended, modified or superseded in some respect. In this regard, the number of States which have recently amended or are considering amending their national law or policy with respect to the expulsion of aliens in response to growing concerns relating to international terrorism is quite remarkable.

II. FACTUAL BACKGROUND

6. The expulsion of aliens affects thousands of people every year. It is difficult to obtain precise statistics concerning the incidents of expulsion on a global level. The individuals who are subject to expulsion come from different regions of the world. They travel to different countries. They have different reasons for leaving their country of origin and different reasons for selecting their country of destination. They include men, women and children of all ages. They speak different languages. They have different ethnic, racial and religious backgrounds. They have varying degrees of education. They include executives of multinational corporations, highly skilled professionals and unskilled labourers. In some instances, wrongful expulsions involve significant property or other economic losses for the individuals concerned.[2] This diverse group of human beings has one thing in common. They have travelled to a foreign country where they are no longer welcome. The expulsion of aliens will most likely continue to occur with increasing frequency as international migration continues to increase.

7. International migration has increased significantly in the last fifty years for various reasons. This trend is expected to continue in the future as discussed below:

> "Since 1965, the number of international migrants has doubled. As of the year 2000, there were approximately 175 million migrants throughout the world. Thus, approximately 2.59% of the world population, or one in every thirty-five persons, are migrants. There are multiple reasons for this: the collapse of long-standing political barriers to movement, the development of worldwide communication systems, and the relative cheapness of modern means of transport – to name but a few. None of these trends is likely to be reversed in the foreseeable future. Hence, the growing awareness of the phenomenon of international migration among both policy makers and academic experts."[3]

8. The globalization of the world economy as well as the disparity in the standard of living and the level of human security in different parts of the world have also been identified as factors contributing to international migration:

> "The world has been transformed by the process of globalization. States, societies, economies and cultures in different regions of the world are increasingly integrated and interdependent. New technologies enable the rapid transfer of capital, goods, services,

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[2] "*Wrongful expulsion.* In three small claims selected to serve as 'test cases', each Chamber has considered the international law applicable to property losses stemming from expulsions of aliens. (As noted earlier, the Tribunal's jurisdiction for purposes of such claims is limited to property losses.) These cases are important to the Tribunal's management of the huge docket of small claims, since perhaps two-thirds of them involve claims for property losses allegedly stemming from wrongful expulsion from Iran; expulsion issues arise in other cases as well." John R. Crook, "Applicable law in international arbitration: The Iran-U.S. Claims Tribunal experience", *American Journal of International Law*, vol. 83, 1989, pp. 278-311, at p. 308.

[3] Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, p. vii.

information and ideas from one country and continent to another. The global economy is expanding, providing millions of women, men and their children with better opportunities in life. But the impact of globalization has been uneven, and growing disparities are to be found in the standard of living and level of human security available to people in different parts of the world.

"An important result of these rising differentials has been an increase in the scale and scope of international migration. According to the UN's Population Division, there are now almost 200 million international migrants, a number equivalent to the fifth most populous country on earth, Brazil. It is more than double the figure recorded in 1980, only 25 years ago. Migrants are now to be found in every part of the globe, some of them moving within their own region and others travelling from one part of the world to another. Almost half of all migrants are women, a growing proportion of whom are migrating independently."[4]

9. The 2005 Report of the Global Commission on International Migration (GCIM) contains information concerning international migration based on the most recent available information provided by the United Nations Department of Economic and Social Affairs, the World Bank, the International Organization for Migration, the International Labour Organization and the United Nations High Commissioner for Refugees. This report contains the following information concerning the number of international migrants:

- There are nearly 200 million international migrants in 2005, counting only those who have lived outside their country for more than one year and including 9.2 million refugees
- This is equivalent to the population of the 5th largest country – Brazil
- 1 in 35 people is an international migrant; or 3% of the world's population
- Numbers are increasing rapidly: from 82 million international migrants in 1970 through 175 million in 2000 to nearly 200 million today.[5]

10. The GCIM Report also contains information concerning migrant women as follows:

- Almost half the world's international migrants are women (48.6%)
- Some 51% of migrant women live in the developed world, compared with 49% in the developing world

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[4] *Migration in an interconnected world: New directions for action,* Report of the Global Commission on International Migration, October 2005, synopsis, p. 1, paras. 1 and 2.

[5] Ibid., p. 83.

- There are more female than male international migrants in Latin America and the Caribbean, North America, Oceania, Europe and the former USSR.[6]

11. The GCIM Report indicates that the most important countries of origin of migrants were as follows:

- The Chinese diaspora has an estimated 35 million people
- The Indian diaspora has some 20 million
- The Filipino diaspora has some 7 million.[7]

12. The GCIM Report provides the following information concerning the destination of migrants:

- 56.1 million in Europe (including the European part of the former USSR), accounting for 7.7% of Europe's population
- 49.9 million in Asia, accounting for 1.4% of Asia's population
- 40.8 million in North America, accounting for 12.9% of North America's population
- 16.3 million in Africa, accounting for 2% of Africa's population
- 5.9 million in Latin America, accounting for 1.1% of Latin America's population
- 5.8 million in Australia, accounting for 18.7% of Australia's population.[8]

13. The GCIM Report also indicates that the most important host countries for migrants in the year 2000 were as follows:

- The USA has some 35 million: 20% of the world's migrants
- The Russian Federation has some 13.3 million: 7.6% of the world's migrants
- Germany has some 7.3 million: 4.2% of the world's migrants
- Ukraine has some 6.9 million: 4.0% of the world's migrants
- India has some 6.3 million: 3.6% of the world's migrants

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[6] Ibid.

[7] Ibid., p. 84.

[8] Ibid., p. 83.

- **Migrants comprise more than 60% of the total population in Andorra, Macao Special Administrative Region of China, Guam, the Holy See, Monaco, Qatar and the United Arab Emirates.[9]**

14. The GCIM Report further indicates the following changes in the distribution of migrants:

- **From 1980 to 2000, the number of migrants living in the developed world increased from 48 million to 110 million; compared with an increase from 52 million to 65 million in the developing world**
- **Today, some 60% of the world's migrants live in the developed world**
- **In 1970, migrants comprised 10% of the population in 48 countries; this had increased to 70 countries by 2000**
- **From 1970 to 2000, the proportion of the world's migrants living in North America rose from 15.9% to 22.3%, and in the former USSR from 3.8% to 16.8%**
- **From 1970 to 2000, the proportion of the world's migrants living in other parts of the world decreased from: 34.5% to 25% in Asia; 12% to 9% in Africa; 7.1% to 3.4% in Latin America and the Caribbean; 22.9% to 18.7% in Europe, and 3.7% to 3.1 % in Oceania.[10]**

15. The GCIM Report provides information concerning the extent of the problem of irregular or illegal migrants as follows:

- **An estimated 2.5 to 4 million migrants cross international borders without authorization each year**
- **At least 5 million of Europe's 56.1 million migrants in 2000 had irregular status (10%)**
- **Some 500,000 undocumented migrants are estimated to arrive in Europe each year**
- **An estimated 10 million migrants live in the USA with irregular status**
- **An estimated 50% of the Mexican-born population in the USA in 2000 had irregular status (4.8 million)**
- **Some 20 million migrants with irregular status live in India**
- **An estimated 600-800,000 people are trafficked each year**

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[9] **Ibid.**

[10] **Ibid., p. 84.**

- Migrant smugglers and human traffickers make an estimated $10 billion profit each year.[11]

16. The GCIM Report also provides information concerning the number of refugees and asylum seekers as follows:

- 6.5 million of the world's 9.2 million refugees live in developing countries
- From 2000 to 2004, the global refugee population decreased by 24%
- Refugees represent 23% of international migrants in Asia; 22% in Africa, and 5% in Europe
- Pakistan hosts the largest number of refugees; just over 1 million (11% of the global total)
- From 1994 to 2003 some 5 million people applied for asylum in the industrialized countries; refugee or equivalent status was granted to 1.4 million of them (28%)
- In 2004, 676,000 applications for asylum were submitted in 143 countries; representing a 19% decrease from 830,300 in 2003
- In 2004, 83,000 refugees were resettled, mainly in the USA (53,000), Australia (16,000) and Canada (10,000).[12]

17. The GCIM Report recognizes the link between migration and security concerns in the light of recent incidents of violence committed by migrants and international terrorism.

> "The linkage between migration and security has become an issue of even greater international concern. Recent incidents involving violence committed by migrants and members of minority groups have led to a perception that there is a close connection between international migration and international terrorism. Irregular migration, which appears to be growing in scale in many parts of the world, is regarded by politicians and the public alike as a threat to the sovereignty and security of the state. In a number of destination countries, host societies have become increasingly fearful about the presence of migrant communities, especially those with unfamiliar cultures and that come from parts of the world associated with extremism and violence."[13]

18. The presence of large numbers of aliens may have significant consequences for the countries of destination, as discussed below.

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[11] Ibid., p. 85.

[12] Ibid.

[13] Ibid., para. 23. See, for example, Mark Landler, "France prepares to deport foreigners guilty of rioting", *The New York Times*, 10 November 2005, p. A12.

"However, migration is to a large extent perceived negatively in countries of destination. Migrants are often seen as potential competitors by the domestic labor force; they are blamed for the rise in criminality; in case of recession they are the first to lose their jobs and burden the social security system; even the cultural identity of the local population is said to be at stake if faced with too many immigrants. Disruptive and disorderly movements are considered to be a threat to internal order and stability. Worse, since September 11, 2001, migrants are perceived as potential terrorists. The situation is exacerbated by the reluctance of some countries of origin to readmit their own citizens as well as by the perceived tolerance on the part of these same states of smuggling and trafficking of human beings." [14]

19. There is no comprehensive international legal regime which governs international migration or a comprehensive regional or multilateral institution to address issues relating to international migration, including expulsion. The following views have been expressed concerning the absence of such an agreement or institution as well as the increasing need for a more coordinated international approach to international migration in the future.

"This does not mean that there are no international treaties dealing with migration. On the contrary, there are many agreements, as well as bilateral, regional, and multilateral conventions aimed at managing aspects of migration, in particular in the humanitarian field. Some of these rules work satisfactorily whereas others are not fully implemented. In certain areas, however, no rules or guidelines to regulate interstate cooperation exist.

"With the exception of the European Union and of the limited scope of the General Agreement on Trade in Services in the World Trade Organization (WTO), there is no comprehensive regional or multilateral institution that deals with the relations among States, or tries to bring order to the myriad of conventions, agreements, guidelines, and best practices, on migration. There is no global system of orderly movements, managing in a cooperative way and combining efficiency, equity, and respect for the interests of the countries of origin, of transit and destination. There is also no umbrella agreement like the WTO that stipulates minimum standards with which unilateral action or bilateral agreements must comply.

"In view of the importance of the issues involved, the question arises - why? The most important reason is no doubt State sovereignty; migration is thought to be too sensitive an issue to be dealt with in a binding multilateral context. Understandably, Governments want to maintain sovereign authority, and international organizations active in the field of migration are reluctant to relinquish any of their responsibilities to an overall framework of migration.

"The uncoordinated approach to migration may have functioned well enough until now. However, without better cooperation and partnership between concerned countries, irregular migration will continue to increase and to foster lasting negative perceptions towards aliens. The consequences of such developments may affect relations among States, as well as the delicate balance in the international trade and financial regimes and global security.

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[14] Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, p. vii.

> "Although policy makers are becoming gradually more aware that domestic measures alone are not sufficient to cope with the occurrence of migration and that the problem is now increasingly discussed at the international level, there has been, until now, no broad-based initiative to open up a dialogue between countries of origin, countries of transit, and countries of destination on the full range of migration issues. This is astonishing. While it is true that countries of origin, of transit, and of destination have different interests, these countries also have many common concerns. All stakeholders involved and, last but not least, the migrants themselves, would benefit from a better management of migration at the international level."[15]

20. The 2005 World Summit attended by Heads of State and Government was held at United Nations Headquarters from 14 to 16 September 2005. The World Summit Outcome acknowledges the need to deal with the challenges and opportunities provided by migration and further provides for the high-level dialogue of the General Assembly on international migration to be held in 2006.[16]

21. It may be useful to consider issues relating to the expulsion of aliens against this general background.

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[15] Ibid., p. viii.

[16] See General Assembly resolution 60/1, 2005 World Summit Outcome, 16 September 2005, para. 61.

III. SCOPE OF THE TOPIC

22. There are a number of issues which may need to be considered in relation to the scope of the topic with respect to: (1) the notion of aliens; (2) the notion of the presence of an alien in the territory of another State; (3) the notion of expulsion by the territorial State; (4) the distinction between individual expulsions and mass expulsions; (5) the expulsion of aliens in time of armed conflict; (6) the relevance of treaty law; as well as (7) the relevance of national law and practice.

A. The notion of aliens

1. Aliens in general

23. The first issue to consider in determining the scope of the present topic is the notion of aliens.

> "The first and most general condition which is held to limit the power to expel is that its exercise should be confined to aliens. This limitation flows from the nature of the legal relationship which exists between the expelling State and the State of which the alien is a national. Thus, the duty of a State to receive its nationals expelled from another State has been described as the corollary of the 'right' of expulsion ..."[17]

24. An alien is generally understood to be a natural person[18] who is not a national of the State in which he or she is present.[19] This may include foreign nationals as well as stateless persons.[20] The determination of any legal issues with respect to the nationality of an individual would depend upon

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[17] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 201.

[18] "In the strict sense of the term, a foreign corporation is not an alien." Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 102.

[19] "To call an individual an alien is to classify him according to his juridical status ... The important element ... is that the individual who lives in a certain State does not possess its nationality." Andreas Hans Roth, *The Minimum Standard of International Law Applied to Aliens,* Thèse, Université de Genève/Institut universitaire de hautes études internationales, La Haye, A. W. Sihthoff's Uitgeversmaatschappij N.V., 1949, pp. 32-33 (citations omitted).

[20] Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 110.

the relevant rules of municipal law as well as international law.[21] These rules have been addressed by the International Law Commission in its consideration of other topics.[22]

25. For purposes of the present topic, it may be sufficient to note that such issues may arise particularly with respect to the expulsion of dual[23] or plural nationals[24] as well as former nationals. In this regard, attention may be drawn to the partial award of the Eritrea-Ethiopia Claims Commission which found that Ethiopia had violated international law by expelling dual nationals without reason.[25] Attention may also be drawn to the *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic*

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[21] "The right of a State to determine who are, and who are not, its nationals is an essential element of its sovereignty. This is recognised by theory and practice." Paul Weis, *Nationality and Statelessness in International Law*, 2nd ed., Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, p. 65. "The right of a state to determine, through nationality, which persons shall be tied to it by the rights and duties of citizenship falls within its domestic jurisdiction, unless the granting or deprivation of citizenship has an international aspect through its impact on other states." Hurst Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht, Martinus Nijhoff Publishers, 1987, p. 60. "As a general rule, international law leaves it to each state to define who are its nationals, but the state's discretion can be limited by treaties, such as treaties for the elimination of statelessness. Even under customary law, a state's discretion is not totally unlimited ...." Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed., London/New York, Routledge, 1997, p. 263. Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 373 *et seq.*; and Sir Robert Y. Jennings, "International Law", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 2, 1995, pp. 1159-1178, at p. 1175.

[22] *See The Work of the International Law Commission*, 6th ed., New York, United Nations, vol. I, pp. 109-114 and 190-194.

[23] *See* K. C. Kotecha, "The Shortchanged: Uganda Citizenship Laws and How They Were Applied to its Asian Minority", *International Lawyer*, vol. 9, 1975, pp. 1-29, at pp. 2-3 (citations omitted). The author reports the following: "In a speech made August 19, 1972, outside the national capital, the president [of Uganda] had said: 'And I will not only send away those Asians (referring to non-citizen Asians), but *every* Asian whatever his citizenship.' By August 23, however, partly in response to international protests, he had relented. In a rambling telegram to the Tanzanian president, he explained that his expulsion orders did not apply to Asians who were Ugandan citizens. He carefully qualified this statement by adding, in the same telegram, that '[I]n a later second phase, Asians claiming Ugandan citizenship who obtained it by corruption or forgery or who had dual nationality will be given notice to quit'. His representative at the United Nations, Mr. Wapenyi, had assured the members, on the same day, that all persons who had become citizens of Uganda would be allowed to continue to reside in the country 'regardless of color, *provided* their papers were not forged.'" For a discussion of the expulsion of Asians with dual nationality from Uganda in 1972, *see* John L. III. Bonee, "Caesar Augustus and the Flight of the Asians: the International Legal Implications of the Asian Expulsion from Uganda during 1972", *International Lawyer*, vol. 8, No. 1, 1974, pp. 136-159, at pp. 140 and 145.

[24] For a general discussion of dual and plural nationality, *see* Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 882-886.

[25] "*Findings on Liability for Violation of International Law* [...] 7. For permitting local authorities to forcibly to expel to Eritrea an unknown, but considerable number of dual nationals for reasons that cannot be established ..." *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, para. 160 E.

Republic of the Congo) case pending before the International Court of Justice.[26] These issues have also been addressed in the national laws of States.[27]

2. Specific categories of aliens

26. The law relating to the expulsion of aliens developed first in relation to the notion of aliens in general as part of the broader field of international law governing the treatment of aliens, including illegal aliens and resident aliens. The development of international human rights law for all individuals as well as the rights of specific categories of individuals has led to the further refinement of some requirements for the lawful expulsion of aliens in general as well as additional requirements for specific categories of aliens such as illegal aliens, resident aliens, migrant workers and their family members, minor children, refugees and stateless persons.[28]

27. The question arises as to whether the scope of the topic should be limited to the rules of international law which govern the expulsion of aliens in general or be extended to include the additional rules of international law which govern the expulsion of specific categories of aliens. The narrower approach to the topic would be less complicated and more expeditious by focusing on the rules of law governing the expulsion of aliens in general which have a long history and are, in many respects, fairly well established. The broader approach to the topic would provide a comprehensive regime for the expulsion of various categories of aliens by including the general rules which apply to all aliens as well as additional rules for specific categories of aliens where appropriate. Such an approach would be more complicated and more time-consuming since it would require consideration of the relevant rules provided by other fields of international law governing the treatment of specific categories of aliens. In addition, these more recent rules may not be as fully developed or as well established.

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[26] In its application, the Republic of Guinea expressed the following view: "In the present case there can be no doubt that the effective nationality of Mr. Diallo is Guinean, and this is confirmed by the fact that the Democratic Republic of the Congo expelled him to Guinea, which illustrates that he is more Guinean than Congolese". *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, International Court of Justice, Application instituting proceedings, filed in the Registry of the Court on 28 December 1998, 1998 General List No. 103, p. 33.

[27] For example, as regards dual nationals, the laws of Belarus and Poland consider an alien with dual nationality to be the national of the State which issued the travel documents presented by the alien upon crossing the border (Belarus, 1993 Law, article 1; and Poland, 2003 Act No. 1175, article 5). Nigeria applies immigration controls to a dual-national Nigerian who elects to be considered the national of the other State, although the relevant Minister may exempt any "person or class of persons" from such requirements (Nigeria, 1963 Act, article 37(2)(a) and (3)).

[28] "It may be useful to establish a definition of expulsion and distinguish it from other measures that a State may take with regard to individuals. This is not intended to exclude the possibility that some rules concerning expulsion also apply with regard to other measures, nor is it meant to imply that all cases of expulsion necessarily come under one and the same regime." Giorgio Gaja, "Expulsion of Aliens: Some Old and New Issues in International Law", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3, 1999, pp. 283-314, at p. 289.

3. Aliens with special privileges and immunities

28. There are other categories of aliens, who are entitled to special privileges and immunities and may therefore be exempt from expulsion, including diplomats, consular officers, members of special missions and international civil servants.[29] The presence of such an alien may nonetheless become contrary to the interests of the territorial State. In such a case, the alien may be required to leave the territory of the State. The compulsory departure of such an alien constitutes a special case which is governed by a separate legal regime (*lex specialis*) rather than the rules of international law which govern the expulsion of aliens.[30] However, the failure to comply with the requirements for maintaining the special status or with the special procedures[31] for the compulsory departure of such aliens within a reasonable period may result in the application of the normal immigration laws concerning the expulsion of aliens. In this regard, attention may be drawn to the case brought by the Commonwealth of Dominica against Switzerland before the International Court of Justice. This case involves the question of whether a diplomat accredited to an international organization may be subject to compulsory departure by the host country as a result of engaging in activities other than diplomacy. The case is presently pending before the Court.[32]

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[29] For example, the United Kingdom exempts the following categories of aliens from expulsion: (1) diplomats, members of their family, persons who form part of their household and persons who as diplomatic agents are otherwise entitled to like immunity (United Kingdom, 1971 Act, section 8(3)); (2) consular officers (other than honorary consular officers) (United Kingdom, 1972 Order, articles 4(h)-(j)); (3) foreign members of government visiting on official business (United Kingdom, 1972 Order, article 4(a)); and (4) officials and employees of certain international organizations and tribunals (United Kingdom, 1972 Order, articles 4(b)-(d)).

[30] "There are special rules for aliens who have diplomatic status, which, constituting a quite separate body of law, are dealt with elsewhere." Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 102.

[31] For example, in relation to special status, Brazil permits the expulsion of diplomats or foreign officials who perform remunerable work for any entity other than the foreign State (Brazil, 1980 Law, articles 56 and 103). In relation to special procedures, China permits the enforced departure of an alien who has: (1) lost diplomatic or consular status through being declared *persona non grata* or unacceptable "in accordance with relevant international treaties as well as the Regulations of the People's Republic of China concerning Diplomatic Privileges and Immunities"; and (2) not left China within the specified time, without having just cause for this delay (China, 1998 Provisions, article 336, and 1992 Provisions, articles I(iv) and II(v)).

[32] On 26 April 2006, the Commonwealth of Dominica brought a case against Switzerland before the International Court of Justice. The applicant claims that Switzerland has violated the relevant rules of international law by denying a diplomatic envoy of Dominica to the United Nations the right to remain in Switzerland as a diplomat, on the basis that he was a businessman and as such would not have the right to be a diplomat. See *Proceedings instituted by the Commonwealth of Dominica (Dominica v. Switzerland)*, International Court of Justice, Application instituting proceedings concerning violation of rules concerning diplomatic relations, filed in the Registry of the Court on 26 April 2006, 2006 General List No. 134.

(a) Diplomats

29. A diplomat may be declared *persona non grata* and required to leave the State in accordance with the relevant rules of international law which govern diplomatic relations.

> "Once admitted, the diplomatic agent enjoys personal inviolability and general immunity from criminal and most civil and administrative jurisdiction. He is not, therefore, subject to alien registration laws or to deportation. However, the receiving State may declare the head of a mission, or any member of the diplomatic staff, to be *persona non grata* at any time. The sending State is then obliged to recall the person concerned or to terminate his functions with the mission. If it refuses to do so, or fails to act within a reasonable time, then the receiving State may itself refuse to recognize that person as a member of the mission. The provisions of immigration and other laws would then apply, although before that moment the diplomat must be given a reasonable time in which to effect his own departure." [33]

(b) Consular officers

30. A consular officer may similarly be declared *persona non grata* and required to leave the State in accordance with the relevant rules of international law which govern consular relations.[34] The rules of international law governing consular relations are relatively recent and perhaps not as well established as those governing diplomatic relations. In the past, there have been instances in which a

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[33] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 148 (citations omitted). *See* Vienna Convention on Diplomatic Relations, 18 April 1961, United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95, at p. 102, article 9, paragraphs 1 and 2: "1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. ... 2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission." In 2005, for example, Belarus and Poland expelled each other's diplomats. *See* "Belarus orders expulsion of Polish diplomat", 18 July 2005, at www.charter97.org/eng/news/2005/07/18/poland (accessed 25 January 2006); David Ferguson, "Belarus expels US professor and Polish diplomat", Euro-Reporters, 18 July 2005, at www.charter97.org/eng/news/2005/07/18/us (accessed 25 January 2006); "Poland disputes Belarus expulsions", 18 July 2005, at www.charter97.org/eng/news/2005/07/18/disputes (accessed 25 January 2006); and "Poland expels Belarus diplomat in tit-for-tat move", 25 July 2005, *available in* United Nations DPI News Monitoring Unit.

[34] Vienna Convention on Consular Relations, Vienna, 24 April 1963, United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261, at p. 280, article 23, paragraphs 1, 2 and 4: "1. The receiving State may at any time notify the sending State that a consular officer is *persona non grata* or that any other member of the consular staff is not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his functions with the consular post. 2. If the sending State refuses or fails within a reasonable time to carry out its obligations under paragraph 1 of this Article, the receiving State may, as the case may be, either withdraw the *exequatur* from the person concerned or cease to consider him as a member of the consular staff. [...] 4. ... the receiving State is not obliged to give to the sending State reasons for its decision."

consul has been expelled.[35] More recently, the trend has been to extend privileges to consular officers which are similar to those enjoyed by diplomatic agents.[36]

(c) Members of special missions

31. A representatives of a special mission may also be declared *persona non grata* and required to leave the State in accordance with the relevant rules of international law which govern *ad hoc* diplomacy or special missions.[37] As in the case of consular relations, the rules of international law governing special missions are relatively recent and perhaps not as well established as those governing diplomatic relations.[38]

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[35] "In one of the Mexican Claims cases, the Umpire required the expelling State to show that it had good reason from the expulsion of a United States consul." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 460 (referring to *The Chase Case (United States of America v. Mexico), in* John Bassett Moore, *History and Digest of the International Arbitrations To Which the United States Has Been a Party*, vol. IV, pp. 3336-3337).

[36] "Consuls are in principle distinct in function and legal status from diplomatic agents … The authorities reveal differences of opinion concerning the personal inviolability of consular officials and in principle they are liable to arrest or detention." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, pp. 355-356 (citations omitted). "Recently, there has been a movement towards raising consuls more or less to the level of diplomatic agents, and in many respects they now enjoy similar privileges." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 148. "Furthermore, if, after granting the *exequatur*, the receiving State objects, for reasons relating to the person or the behaviour of the head of the consular post, to the continuance of the performance of his duties, it may at any moment notify the sending State that the officer in question is *persona non grata*. In such a case, the sending State is obliged to recall the head of the consular post within a reasonable time. Again, the receiving State is not obliged to give reasons for its decision, as it exercises a right of a discretionary character." Constantin Economidès, "Consuls", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 770-776, at p. 772.

[37] Convention on Special Missions, 8 December 1969, United Nations, *Treaty Series*, vol. 1400, No. 23431, p. 231, at p. 235, article 12, paragraphs 1 and 2: "1. The receiving State may, at any time and without having to explain its decision, notify the sending State that any representative of the sending State in the special mission or any member of its diplomatic staff is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. … 2. If the sending State refuses, or fails within a reasonable period, to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the special mission."

[38] "Beyond the sphere of permanent relations by means of diplomatic missions or consular posts, states make frequent use of *ad hoc* diplomacy or special missions. These vary considerably in functions … These occasional missions have no *special* status in customary law but it should be remembered that, since they are agents of states and are received by the consent of the host state, they benefit from the ordinary principles based upon sovereign immunity and the express or implied conditions of the invitation or license received by the sending state." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 357. *See also* Matthias Herdegen, "Special Missions", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 574-577.

(d) International civil servants

32. The compulsory departure of the official of an international organization would be governed by the constituent instrument of the international organization as well as any relevant treaties, such as agreements of member States or host country agreements.[39] The situation with respect to officials of the United Nations, for example, has been described as follows:

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[39] *See* Agreement regarding the Headquarters of the United Nations, Lake Success, 26 June 1947, approved by the General Assembly of the United Nations on 31 October 1947, United Nations, *Treaty Series*, vol. 11, No. 147, p. 11, at pp. 20, 22, 24 and 26:

"Section 11

The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of: (1) representatives of Members or officials of the United Nations, or of specialized agencies as defined in Article 57, paragraph 2, of the Charter, or the families of such representatives or officials, (2) experts performing missions for the United Nations or for such specialized agencies, (3) representatives of the press, or of radio, film or other information agencies, who have been accredited by the United Nations (or by such a specialized agency) in its discretion after consultation with the United States, (4) representatives of non-governmental organizations recognized by the United Nations for the purpose of consultation under Article 71 of the Charter, or (5) other persons invited to the headquarters district by the United Nations or by such specialized agency on official business. The appropriate American authorities shall afford any necessary protection to such persons while in transit to or from the headquarters district. This section does not apply to general interruptions of transportation which are to be dealt with as provided in Section 17, and does not impair the effectiveness of generally applicable laws and regulations as to the operation of means of transportation. [...]

Section 13

[...] (*b*) Laws and regulations in force in the United States regarding the residence of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11 and, specifically, shall not be applied in such manner as to require any such person to leave the United States on account of any activities performed by him in his official capacity. In case of abuse of such privileges of residence by any such person in activities in the United States outside his official capacity, it is understood that the privileges referred to in Section 11 shall not be construed to grant him exemption from the laws and regulations of the United States regarding the continued residence of aliens, provided that:

(1) No proceedings shall be instituted under such laws or regulations to require any such person to leave the United States except with the prior approval of the Secretary of State of the United States. Such approval shall be given only after consultation with the appropriate Member in the case of a representative of a Member (or a member of his family) or with the Secretary-General or the principal executive officer of the appropriate specialized agency in the case of any other person referred to in Section 11;

(2) A representative of the Member concerned, the Secretary-General or the principal executive officer of the appropriate specialized agency, as the case may be, shall have the right to appear in any such proceedings on behalf of the person against whom they are instituted;

(3) Persons who are entitled to diplomatic privileges and immunities under Section 15 or under the General Convention shall not be required to leave the United States otherwise than in accordance with the customary procedure applicable to diplomatic envoys accredited to the United States. [...]

"The privileges and immunities of diplomats are well founded in customary law and have since been codified and developed in international conventions. The status of officials of and representatives to international organizations is not so well settled and is largely dependent on treaty. Previously, international officials were treated by analogy with diplomats, although this practice could clearly compromise their independent status by subjecting them to the vagaries of national passport regimes and to the personal objections of receiving States. Article 105(2) of the United Nations Charter declares that the representatives of Members and the officials of the Organization are to enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization …

"It follows from the fact that international officials are not accredited to States (as diplomats are) that the principle of *persona non grata* is not applicable to them. The proper

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(*d*) Except as provided above in this section and in the General Convention, the United States retains full control and authority over the entry of persons or property into the territory of the United States and the conditions under which persons may remain or reside there.

(*e*) The Secretary-General shall, at the request of the appropriate American authorities, enter into discussions with such authorities, with a view to making arrangements for registering the arrival and departure of persons who have been granted visas valid only for transit to and from the headquarters district and sojourn therein and in its immediate vicinity.

(*f*) The United Nations shall, subject to the foregoing provisions of this section, have the exclusive right to authorize or prohibit entry of persons and property into the headquarters district and to prescribe the conditions under which persons may remain or reside there." […]

Section 15

(1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary;

(2) Such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned;

(3) Every person designated by a member of a specialized agency, as defined in Article 57, paragraph 2 of the Charter, as its principal permanent representative, with the rank of ambassador or minister plenipotentiary at the headquarters of such agency in the United States; and

(4) Such other principal resident representatives of members of a specialized agency and such resident members of the staffs of representatives of a specialized agency as may be agreed upon between the principal executive officer of the specialized agency, the Government of the United States and the Government of the Member concerned, shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it. In the case of Members whose governments are not recognized by the United States, such privileges and immunities need be extended to such representatives, or persons on the staffs of such representatives, only within the headquarters district, at their residences and offices outside the district, in transit between the district and such residences and offices, and in transit on official business to or from foreign countries."

> procedure is for the host State to make its representations to the Secretary-General who alone can decide whether they shall be withdrawn from the territory."[40]

4. Members of armed forces

(a) National armed forces

33. The members of the armed forces of a State have a special status as an organ of the sending State when they are in the territory of another State.[41] The members of the armed forces of a State may be present in the territory of another State in a number of different situations[42] which are governed by different rules of international law. First, members of the armed forces who are present in the territory of another State in time of armed conflict or in belligerent occupation are governed by the laws of armed conflict. Secondly, members of the armed forces who are present in the territory of a friendly allied State in time of armed conflict are usually exempt from the jurisdiction of the territorial State.[43] Third, members of the armed forces who are present in the territory of another consenting

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[40] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 152 and 155 (citations omitted). In 2001, Iraq ordered the expulsion of eight United Nations personnel. The expulsions were brought to the attention of the Security Council. "On 6 September, Mohammad Al-Douri, Iraq's ambassador to the United Nations, announced that Baghdad had ordered the expulsion of eight U.N. employees, of whom at least five are suspected of espionage on behalf of the United States. Iraq had previously accused five U.N. employees (four Nigerians and a Bosnian) of acting against its national security and committing espionage for enemy states. The U.N. Security Council, finding that Iraq had not justified its decision, requested the French ambassador, Jean-David Levitte, who currently holds the Security Council's presidency, to demand further information on the matter." "Expulsion of eight U.N. employees", *Le Monde*, 8 September 2001, *available in* Factiva [French original].

[41] "Armed forces are organs of the state which maintains them, being created to maintain the independence, authority, and safety of the state. They have that status even when on foreign territory, provided that they are there in the service of their state, and not for some private purpose." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 1154.

[42] "Although generally in time of peace the armed forces of a state remain on national territory, there are several occasions for armed forces to be on foreign territory in the service of their home state. Thus, a state may have a right to keep troops in a foreign base, or to send troops through foreign territory. A state which has been victorious in war with another may, after the conclusion of peace, occupy a part of the territory of its former opponent as a guarantee for the execution of the treaty of peace." Ibid., p. 1154 (citation omitted).

[43] "During war a state's armed forces will often be on the territory of a foreign state, whether while conducting military operations, or in belligerent occupation of foreign territory or as a co-belligerent force on the territory of an allied state in furtherance of the common task of repelling or expelling enemy forces. These occasions are subject to special considerations related to the existence of a war ..." Ibid., p. 1155.

State in time of peace[44] are usually governed by an agreement[45] between the sending State and receiving State, such as a status of forces agreement.[46] The position of military personnel performing special tasks may be governed by special arrangements.[47]

(b) Multinational armed forces

34. The members of the armed forces of an international organization who are present in the territory of a State also have a special status which is determined by the constituent instrument and other relevant rules of the international organization as well as international agreements. The United Nations has utilized the armed forces of Member States in numerous peacekeeping operations with

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[44] "In peacetime a state's armed forces will most usually be in the territory of another state at its invitation or with its consent, given either for a particular purpose, or more generally as when members of an alliance allow each other's armed forces on their territories." Ibid., p. 1155.

[45] "As a matter of customary international law the position of a state's armed forces when in another state is not settled. The development of the law has been influenced by the legal position of foreign warships and their crews, but their position differs in significant respects from that of armed forces on land. In determining the latter's status, much depends on the circumstances of their presence in foreign territory and whether they are there on a relatively long-term basis, or within a defined base or camp area, or are merely exercising a right of passage, or fulfilling some limited short-term purposes … The view, formerly widely held, that the force was in all respects to be regarded as beyond the jurisdiction of the territorial state (subject to the possibility of a waiver of that immunity) and subject only to that of its own authorities can no longer be maintained. The fiction of extra-territoriality has in this area, as in others, been discarded. Apart from treaty provisions, derogations from the territorial state's jurisdictional rights may be derived from the status of the force as an organ of the sending state, or from the consent of the territorial state to receive the force in its territory …. Despite an increasing consistency of view as to the position of a foreign visiting force, the limits of the jurisdiction of the state to which the force belongs and of the territorial state remain far from clear … There are strong practical reasons for avoiding these uncertainties, and states accordingly frequently make special provision by treaty for the position of their armed forces when they are present in a foreign state." Ibid., pp. 1156, 1157 and 1159-1160 (citations omitted).

[46] "Where military forces are in belligerent occupation of territory, their powers are regulated by the laws of war. Where such forces are engaged in belligerent activity, but are fighting on friendly allied territory, they will customarily enjoy complete exemption from the jurisdiction of the territorial sovereignty. However, in situations where such forces are in the territory of another State with its consent, and not actively engaged in hostilities, problems arise from reconciling the jurisdictions of the 'sending' State and the 'territorial' State where the acts of the forces of the sending State are delictual under the territorial State." Derek W. Bowett, "Military Forces Abroad", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 3, 1997, pp. 388-390, at p. 388. (Bowett continues with a discussion of treaties governing the status of forces.)

[47] "Where military personnel are performing special tasks their position will be determined by arrangements made in those contexts, such as the provisions applicable to special missions, to members of commissions, or to inspectors." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 1164 (citations omitted).

varying mandates since its establishment in 1945.[48] In addition, various regional organizations have also utilized the armed forces of their member States in similar operations.[49]

(c) *Lex specialis*

35. Aliens who are members of the armed forces of a State or an international organization constitute another special category of aliens whose presence in the territory of the State is generally governed by special rules of international law rather than those relating to the expulsion of aliens.[50] This issue may also be addressed in national legislation.[51]

> "Not infrequently, States find it necessary or appropriate to exempt from the main or substantial provisions of their immigration laws members of the armed forces of other countries, or of international organizations. A legal obligation to exempt members of those forces from certain provisions of immigration control may derive from an agreement between the receiving State and the sending State; or, in the case of an international organization, such an obligation may derive from the organization's powers, expressed or implied in its charter."[52]

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[48] "The status of UN forces is determined by a variety of legal sources, including the UN Charter, the Convention on the Privileges and Immunities of the United Nations of February 13, 1946, decisions of the UN organs establishing the forces, agreements between the UN and the States in whose territory the forces are stationed, agreements between the UN and States contributing contingents, and regulations issued by the Secretary-General." Raymond Sommereyns and M. Bothe, "United Nations Forces", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 1106-1119, at p. 1110. In December 2005, Eritrea ordered the departure, within 10 days, of the European, United States, Canadian and Russian members serving in the United Nations peacekeeping mission. *See* "U.N.: Eritrea border force endangered, expulsion order for western troops threatens entire mission", *The Times*, London, 8 December 2005; "Everything to lose: the expulsion of UN troops from Eritrea threatens a new war", *The Times*, London, 8 December 2005; Marc Lacey and W. Hoge, "Eritrea expels U.N. peacekeepers, increasing tension with Ethiopia", *The New York Times*, 8 December 2005; Andrew England, "Eritrea orders UN peacekeepers to leave", *Financial Times*, London, 8 December 2005; and Ed Harris, "UN troops ordered out of Eritrea as tensions mount", *The Independent*, London, 8 December 2005.

[49] For a discussion of international military forces established by regional organizations, including the Organization of American States, the League of Arab States and the Organization of African Unity, as well as ad hoc multinational forces established by groups of States, *see* Derek W. Bowett, "International Military Force", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 2, 1995, pp. 1267-1271, at p. 1269.

[50] "This monograph only deals with some basic, across-the-board principles and rules, to which other rules and regulations should conform … Thus the monograph deals only incidentally with the transborder movements of… military forces stationed in friendly foreign countries …" Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. viii.

[51] For example, the United Kingdom exempts from expulsion certain members of the armed forces of specific countries (United Kingdom, 1971 Act, section 8(4)).

[52] Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, pp. 176-177.

5. Nationals

36. Although international law does not appear to prohibit the expulsion of nationals in general,[53] the ability of a State to take such action may be limited by international human rights law.[54] First, some human rights treaties expressly prohibit the expulsion of a person from the territory of the State of which he or she is a national.[55] Secondly, the right of a national to reside or remain in his or her own country may implicitly limit the expulsion of nationals.[56] Thirdly, the duty of other States to

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[53] "A general rule of customary international law forbidding the expulsion of nationals does not exist." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*,, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 110. "Although it might appear that international law limits a valid exercise of the power of expulsion to aliens, actual State practice is more equivocal." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 202. "For a judicial affirmation of the right to deport a national to a foreign country see *Co-operative Committee on Japanese Canadians v Attorney-General for Canada* [1947] AC 87." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 945, No. 19. In contrast, Niall MacDermot (ed.), "Latin America – Expulsion, the Rights to Return, Passports", *The Review: International Commission of Jurists,* No. 14, 1975, pp. 3-8, mentioning cases of expulsions of nationals in Latin America (Bolivia, Chile, Paraguay, Peru and Uruguay) and pointing out that such expulsions were contrary to international law (the right not to be expelled from one's own territory, according to article 22 of the American Convention on Human Rights, and the presumption of innocence) and also, in some cases, to the national law of the States concerned. *See also* Yash P. Ghai, "Expulsion and Expatriation in International Law: The Right to Leave, to Stay, and to Return", *American Society of International Law Proceedings*, vol. 67, 1973, pp. 122-126, at p. 126: "… the rule that there is no right to expel citizens is generally accepted. In this respect it is significant that even Amin felt compelled to withdraw his order against the Uganda-Asian citizens, and that when Kenya, for example, has wished to deport a citizen it has first deprived him of his Kenyan citizenship."

[54] "In nearly all cases expulsion affects persons who do not have the nationality of the expelling State. It could well be said that expulsion of nationals is prohibited by international law. It is expressly forbidden by Article 22(5) of the American Convention on Human Rights, Article 3(1) of Protocol No. 4 to the European Convention on Human Rights and Article 22 of the Arab Charter on Human Rights. An implicit prohibition may be found in Article 12(4) of the UN Covenant on Civil and Political Rights and Article 12(2) of the African Charter on Human and Peoples' Rights." Giorgio Gaja, note 28 above, p. 292.

[55] *See* article 22, paragraph 5, of the American Convention on Human Rights, "Pact of San José, Costa Rica", San José (Costa Rica), 22 November 1969, United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123, at p.151 ("No one can be expelled from the territory of the state of which he is a national …") and article 3, paragraph 1, of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No. 11, Strasbourg, 16 September 1963, *European Treaty Series*, No. 46 ("No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.")

[56] "'One of the functions inherent in the concept of nationality is the right to settle and to reside in the territory of the State of nationality or, conversely, the duty of the State to grant and permit such residence to its nationals.' This right does not stem solely or even primarily from its more recent expressions in the Universal Declaration of Human Rights, Covenant on Civil and Political Rights, and other international human rights instruments but is part of customary international law." Hurst Hannum, *The Right to Leave and Return in International Law and Practice,* Dordrecht, Martinus Nijhoff Publishers, 1987, p. 60 (quoting Paul Weis,

receive individuals is limited to their own nationals.[57] Thus, the expulsion of nationals can only be carried out with the consent of a receiving State.[58] The limitation on the expulsion of nationals may

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Nationality and Statelessness in International Law, 2nd ed., Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, p. 45). "Only citizens have, as a rule, a right to reside within the territory of the state, that is, the right not to be expelled therefrom." Hans Kelsen, *Principles of International Law* (Revised and Edited by Robert W. Tucker), 2nd ed., Holt, Rinehart and Winston, Inc, 1966, p. 372. "The right to reside in the territory of the State of nationality or, conversely, the obligation of the State to grant such residence to its nationals is generally considered as inherent in the concept of nationality. There are, however, a few exceptions to this rule when municipal laws permit the expulsion of nationals as a penal sanction in connection with conviction for a crime. The national subject to such a measure of banishment is thus forced into exile." Rainer Hofmann, "Denationalization and Forced Exile", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, at pp. 1004-1005. *See also* the International Rules on the Admission and Expulsion of Aliens adopted by the Institut de Droit international in 1892, article 2: "In principle, a State must not prohibit … a stay in its territory … to its subjects." The Institut adopted these rules with a view to their future application as appears from the third preambular paragraph of the resolution: "Whereas, from this international point of view, it may be useful to formulate, in a general way and for the future, some firm principles, acceptance of which would not, moreover, involve any assessment of acts committed in the past …". *Règles internationales sur l'admission et l'expulsion des étrangers,* Institut de Droit international, session de Genève, 1892, Résolution du 9 septembre 1892, pp. 218-226.

[57] "International law also to a certain extent indirectly opposes the expulsion of nationals because third States have no international duty to receive expelled individuals of foreign nationality or stateless persons." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 110. "There will be general agreement that a state cannot, whether by banishment or by putting an end to the status of nationality, compel any other state to receive one of its own nationals whom it wishes to expel from its own territory." Sir John Fischer Williams, "Denationalization", *British Yearbook of International Law,* vol. 8, 1927, pp. 45-61, at p. 61. "In earlier periods some legal orders provided for expulsion of their own citizens as a punishment, which was called 'banishment.' Even now, international law does not forbid it as such, but its practical applicability is limited. For the banished individual is a foreigner in any other state; and every state has the right of refusing to permit a foreigner to enter its territory, and at any time to expel any foreigner. The expelled foreigner's own state would violate this right by refusing to permit him to return." Hans Kelsen, *Principles of International Law* (Revised and Edited by Robert W. Tucker), 2nd ed., Holt, Rinehart and Winston, Inc, 1966, pp. 372-373. "The expulsion of a state's own national… is inconsistent with international law because it would cast a burden on other states, which they are not bound to undertake and which, if persistently exercised, would necessarily lead to a disruption of orderly, peaceful relations between states within the community of nations." S.K. Agrawala, *International Law Indian Courts and Legislature,* Bombay, N.M. Tripathi Private Ltd., 1965, pp. 103-104. *See also* Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 49.

[58] "The expulsion of a person who has the nationality of the expelling state or who has no nationality is therefore dependent for its practical effectiveness on the readiness of some other state to receive him even though under no obligation to do so." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 944-945 (citations omitted). "The expulsion of nationals forces other States to admit aliens, but, according to the accepted principles of international law, the admission of aliens is in the discretion of each State … It follows that the expulsion of a national may only be carried out with the consent of the State to whose territory he is to be expelled, and that the State of nationality is under a duty towards other States to receive its nationals back on its territory." Paul Weis, *Nationality and Statelessness in International Law,* 2nd ed., Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, pp. 45-46 (citations omitted). "Since the admission of aliens has always been considered as being in the discretion of each State, the

extend to aliens who have acquired a status similar to nationals under the national law of the territorial State.[59] Fourthly, the national law of a number of States prohibits the expulsion of nationals.[60]

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expulsion of a national may therefore only be carried out with the explicit or implicit consent of the receiving State upon whose demand the State of nationality is under the duty to readmit its national to its territory. This duty has always been considered as an obligation under international law …" Rainer Hofmann, "Denationalization and forced exile", *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, at p. 1005.

[59] "A state is usually unable to expel its own nationals since no other state will be obliged to receive them. It may assimilate certain aliens to its own nationals, so affecting its powers under its own laws to expel them…" Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 940, No. 1. The Supreme Court of Austria held that Italian nationals born in South Tyrol could not be expelled because of an Austrian law requiring that they be treated as nationals for administrative purposes in the *Italian South Tyrol Terrorism Case*, Supreme Court, 8 October 1968, *International Law Reports*, vol. 71, E. Lauterpacht, C.J. Greenwood (eds.), p. 235: "It is controversial whether the prohibition also covers persons who may be assimilated to nationals. Article 12(4) of the UN Covenant states that '[n]o one shall be arbitrarily deprived of the right to enter his own country'. In *Stewart v Canada*, the Human Rights Committee held, with regard to a British national who was expelled from Canada, that 'if article 12, paragraph 4, were to apply to the author, the State party would be precluded from deporting him'. Reading Article 12(4) in conjunction with Article 13, which refers to the expulsion of aliens 'lawfully in the territory of a State party', the Committee maintained that 'his own country' as a concept applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not 'aliens' within the meaning of Article 13'. This would depend on 'special ties to or claims in relation to a given country'. The Committee referred to 'nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them'. The Committee also mentioned 'other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence'. On the contrary, foreign immigrants were excluded with one possible exception, which did not apply to the case in hand: 'were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants'. One difficulty with this exception is that Article 12(4) assumes that a person can consider as his or her own only one country, while the foreign immigrants to whom the Committee referred were likely to have retained their nationality of origin and thus could have used the rights to enter and not to be expelled with regard to two different States: their State of nationality and the State of residence." Giorgio Gaja, note 28 above, pp. 292-293 (citing views adopted on 1 November 1996). Communication No. 538/1993, Stewart v. Canada, 16 December 1996, *International Human Rights Reports* 1997, pp. 418-429, paras. 12.3-12.5.

[60] "Under the municipal law of many States, the expulsion of nationals is unlawful, since the right to live in one's own State is widely regarded as an essential element of the relationship between a State and its nationals." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 110. For example, Nigeria, the Russian Federation and Switzerland prohibit the expulsion of nationals (Nigeria, 1999 Constitution, article 41(1), and 1963 Act, article 1(2)(e); Russian Federation, 2002 Law No. 62-FZ, article 4(5); Switzerland, Federal Constitution, article 25(1)). Nigeria allows the competent Minister to give directions for determining a person's nationality or, when an order for deportation is in force, for disregarding a change in the person's nationality (Nigeria, 1963 Act, article 30(1)). A person in Nigeria has the burden of proof in establishing nationality or a change thereto, and except in cases where the person is present or resident in Nigeria and claiming Nigerian citizenship, a Ministerial direction cannot be questioned in court (Nigeria, 1963 Act, article 30(1)). This question has also been addressed by the national courts of several States as follows. "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien." *Ng Fung Ho et*

Nonetheless, there have been cases in which States have expelled their own nationals to another State.[61] However, these relatively exceptional cases would not appear to be within the scope of the present topic, which by its terms refers specifically to aliens.

6. Former nationals

37. There have also been cases involving the loss of nationality and the expulsion of former nationals by States. The conferment or loss of nationality is generally considered to be within the domestic jurisdiction of a State[62] subject to certain limitations imposed by international law.[63] The

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Al. v. White, Commissioner of Immigration, United States Supreme Court, 29 May 1922, *Annual Digest of Public International Law Cases,* 1919-1922, Sir John Fischer Williams and H. Lauterpacht (eds.), Case No. 180, pp. 257-258. "I have repeatedly said that if it is desired to ask for a recommendation for deportation, evidence must be given that the accused person is an alien, as defined by section 2 of the Ordinance, unless this is admitted by the accused." *Chief Superintendent of Police v. Camara,* Protectorate of Gambia, High Court, 25 January 1957, *International Law Reports,* 1957, H. Lauterpacht (ed.), p. 491. "But, as we have seen, because of Article 19 [of the Constitution] no citizen can be *expelled* (as opposed to extradited) in the absence of a specific law to that effect; and there is no such law." *Muller v. Superintendent, Presidency Jail, Calcutta and Others,* Supreme Court of India, 23 February 1955, *International Law Reports,* 1955, H. Lauterpacht (ed.), pp. 497-500, at p. 497. *See also In re Keibel et al.,* Supreme Court of Costa Rica, 1 June 1939, *Annual Digest and Reports of Public International Law Cases,* 1938-1940, H. Lauterpacht (ed.), Case No. 139, pp. 388-389.

[61] "A duty to receive foreigners is only established if it rests upon treaties (e.g. the Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series,* vol. 189, No. 2545, p. 150). Nevertheless, it has occurred in some rare cases that governments have expatriated nationals and subsequently expelled them as foreigners or have forbidden them to return to the State territory if the expatriated individuals were residing in a foreign country at that time. Such a practice may contravene existing conventions on human rights and it probably contradicts a trend in international law. However, until now no violation of general rules of international law can be asserted, unless the governmental action is judged to be absolutely arbitrary and not based on any reasonable ground, or grossly violates recognized human rights." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 110. "The question of deportation normally arises only in respect of aliens. The deportation by a State of its own citizens ('banishment' or 'exile') is nowadays a rarity and invoked only in times of severe internal disorders." Ivan Anthony Shearer, *Extradition in International Law,* Manchester, University Press, 1971, p. 76.

[62] For example, the United Kingdom entitles the Secretary of State to deprive a person of British citizenship if satisfied that he or she has acted to seriously prejudice the vital interests of the United Kingdom or a British overseas territory (United Kingdom, Act 1981, section 40 (2) as amended by Nationality Immigration and Asylum Act 2002) or if such person's citizenship registration or naturalization was obtained by means of fraud, false representation or concealment of a material fact (United Kingdom, Act 1981, section 40 (3) as amended by the Nationality Immigration and Asylum Act 2002).

[63] *See* Ian Brownlie, *Principles of Public International Law,* 6th ed., Oxford, Oxford University Press, 2003, p. 373 *et seq.*; Sir Robert Y. Jennings, "International Law", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* Amsterdam, Elsevier Science Publishers, vol. 2, 1995, pp. 1159-1178, at p. 1175; Rainer Hofmann, "Denationalization and forced exile", *Encyclopedia of Public International Law,* vol. 1, 1992, pp. 1001-1007, at p. 1001; Lawrence Preuss, "International Law and Deprivation of Nationality", *Georgetown Law Journal,* vol. 23, 1934, pp. 250-276, at p. 254; and John Fischer Williams, "Denationalization", *British Yearbook of International Law,* vol. 8, 1927, pp. 45-61, at p. 50.

expulsion of former nationals who have been deprived of or otherwise lost their nationality has been addressed in the national laws of some States.[64]

38. State practice with respect to the deprivation of the nationality of an individual can be traced to ancient times. In contrast, the deprivation of the nationality of large numbers of individuals is a relatively recent phenomenon which occurred for the first time in the early 1900s.[65] During the twentieth century, some States resorted to mass denationalization for political or economic reasons as a consequence of revolution, war or decolonization.[66] The permissibility of denationalization as a matter of international law was raised primarily in relation to these incidents of mass denationalization.[67]

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[64] For example, Honduras' legislation allows for the expulsion of persons who became naturalized citizens through fraud or whose naturalization cards have been cancelled (Honduras, 2003 Act, article 89(7)); Panama's legislation provides that persons who "for whatever reason renounce or lose" their Panamanian nationality are deemed to be aliens under Panamanian law, and are so treated (Panama, 1960 Decree-Law, articles 39-40); Spain's legislation indicates that those who have lost Spanish nationality will not be expelled unless the infraction serving as the ground for expulsion is of a certain type or is a re-incidence of a similar, expulsion-level infraction (Spain, 2000 Law, article 57); and Nigeria's legislation applies immigration controls to a former national, although the relevant Minister may exempt any "person or class of persons" from such requirements (Nigeria, 1963 Act, article 37(2)(b), (3)).

[65] "Denationalization is a very old form of punishment for antisocial conduct. Its origins may be traced to ancient times. In ancient Rome, for example, citizenship was lost by reduction into slavery, capture in war, and banishment ... It is only after the First World War that denationalization was used as a means of punishing large masses of people for political and other assorted offences." Peter A. Mutharika, *The Regulation of Statelessness under International and National Law*, New York, Oceana Publications, Inc., 1989, pp. 8-9.

[66] "Certainly there have been in this century some notable acts of denationalization and exile on a mass scale but these were related to periods of revolution, war or the aftermath of war." Niall MacDermot (ed.), "Loss of Nationality and Exile", *The Review: International Commission of Jurists*, No. 12, 1974, pp. 22-27, at p. 23. For a discussion of the special legal problems of denationalization in relation to decolonization, *see* Rainer Hofmann, "Denationalization and forced exile", *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishersvol. 1, 1992, pp. 1001-1007, at p. 1004.

[67] "During the 19th century, deprivation of nationality took place almost exclusively as a penal measure upon conviction for certain crimes. The provisions of municipal law concerned raised little discussion as to their consistency with international law... The question of the admissibility of denationalization arose on a larger scale when States began, for political reasons, to withdraw nationality from greater numbers of their nationals." Rainer Hofmann, "Denationalization and forced exile", *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, at p. 1001. "As long as denationalization was administered on an individual basis, it was generally accepted as part of the sovereign right of a state. It was only when it was administered on a large scale for political, racial, religious and other reasons after the First World War that international opinion, especially among learned societies and publicists, began to challenge this practice and agitated for its abolition." Peter A. Mutharika, *The Regulation of Statelessness under International and National Law*, New York, Oceana Publications, Inc., 1989, p. 122 (citations omitted).

39. There is some question as to the extent to which a State has the right to deprive one or more of its nationals of their nationality. In the past, this has been a controversial issue which States have been reluctant to submit to international regulation.

> "Most states take the position that they should retain maximum competence on the question of denationalization. Opponents of denationalization, however, contend that surrender of this competence would not affect the basic interests of a state as the latter would retain other means of punishing a disloyal citizen, for example, by withdrawing diplomatic protection. Protection could then be reinstated if the person renewed his loyalty to the state. They further contend that when a state deprives an individual of his nationality, it also denies itself the right to punish him.
>
> "It seems quite unlikely that states will surrender their right to denationalize an individual in those cases where they consider such denationalization necessary for the protection of the internal value system of the state. This question may in fact have hindered wider ratification of the 1961 Convention since reservations to any of the substantive articles are prohibited. In spite of this attitude, however, several countries have virtually stopped the practice of denationalization — especially in cases which might lead to statelessness."[68]

40. The Eritrea-Ethiopia Boundary Commission has considered the question of the lawfulness of the deprivation of nationality in cases involving single and dual nationals under contemporary international law.[69] The Commission's consideration of this question is discussed in Part X.H.1.

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[68] Peter A. Mutharika, *The Regulation of Statelessness under International and National Law*, New York, Oceana Publications, Inc., 1989, pp. 127-128 (citations omitted) (referring to the Convention on the Reduction of Statelessness, New York, 30 August 1961, United Nations, *Treaty Series*, vol. 989, No. 14458, p. 175). "It was precisely the question of withdrawal of nationality, contained in Article 8 of the Convention which caused a deadlock at the first session of the Conference and required a second session. … This text was a compromise to leave intact most of the provisions on loss of nationality in the national legislation of the States represented. Niall MacDermot (ed.), "Loss of Nationality and Exile", *The Review: International Commission of Jurists*, No. 12, 1974, pp. 22-27, at pp. 26-27. "Article 3 of the Protocol declares that no one shall be expelled by means of either an individual or a collective measure from the State of which he is a national, and that no one shall be deprived of the right to enter the territory of the State of which he is a national. This provision may raise particular problems in regard to nationality. The Committee of Experts proposed the inclusion of a clause to the effect that 'a State would be forbidden to deprive a national of his nationality for the purpose of expelling him' but this was dropped because of doubts about the wisdom of touching on the controversial character of denaturalization measures." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 287 (referring to Protocol No. 4 to the European Convention on Human Rights) (citations omitted).

[69] *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004.

41. The question arises as to whether the scope of the present topic should include consideration of the lawfulness of the deprivation of nationality of an individual prior to expulsion[70] in relation to: (1) the status of an individual as a national or an alien for purposes of expulsion; (2) the validity of the ground for the subsequent expulsion (which may be related to the ground for denationalization);[71] (3) he State of nationality, if any, that has a duty to admit this individual;[72] (4) the destination of persons who are thereby rendered stateless; (5) the duty of a State to receive its former nationals who are expelled from another State;[73] and (6) the applicability of the principle of *non-refoulement* to such individuals as "political refugees".[74]

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[70] "In fact, States rarely resort to expulsion of their former nationals." Paul Weis, *Nationality and Statelessness in International Law*, 2nd ed., Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, p. 126. "Examples have abounded in the past of deportations of forcibly denaturalized persons, but it is to be hoped that they are events of the past." Ivan Anthony Shearer, *Extradition in International Law*, Manchester, University Press, 1971, p. 76.

[71] *See*, in this respect, the position adopted by the International Law Association, according to which "[n]either denationalization nor denial of citizenship to persons born in the receiving State pursuant to *jus sanguinis* may be invoked as a legitimate ground *per se* for deportation, expulsion or refusal of return." International Law Association, Declaration of principles of international law on mass expulsion, 62nd conference of the ILA, Seoul, 24-30 August 1986, *Conference Report 1986*, pp. 13-18, at p. 17, Principle 15.

[72] "States have sometimes deprived persons of their nationality as a prelude to expelling them: since this will not of itself result in their acquiring a new nationality it will not give rise to any obligation on the part of other states to receive the persons concerned on their territory." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 945, No. 19.

[73] "Whereas international law recognizes a duty of a State to admit its nationals expelled from the territory of another State, it seems doubtful whether such an obligation exists as regards former nationals, in particular persons having lost their nationality by unilateral action of the State concerned. It has been argued that since States are under no obligation to permit aliens to reside on their soil, the good faith of the State which had admitted an alien, on the assumption that the State of his nationality would readmit him if expelled, would be deceived if this duty were to be extinguished by subsequent denationalization (Fischer Williams, Lessing, Preuss). An examination of the practice of States, including their treaty practice, shows, however, that customary international law does not impose on the State of former nationality a duty of readmission." Rainer Hofmann, "Denationalization and forced exile", *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, at p. 1005.

[74] "When the denationalization is the result of political differences between the state and the individual, the authorities of a civilized country would be slow to insist on deportation to the state of origin. The individual would, even if his removal were insisted upon, be allowed to endeavour to find some other state whose frontier would not be closed." John Fischer Williams, "Denationalization", *British Yearbook of International Law*, vol. 8, 1927, pp. 45-61, at p. 58 (citation omitted). "Legislation imposing the loss of nationality as a penalty is primarily dictated by political motives, and is designed to rid the state of citizens whose conduct is deemed inconsistent with their obligations of loyalty to the state, or, more accurately, to the government in power. ... These persons are, in fact, political refugees, for whom the state of sojourn is an asylum. In insisting upon its right to expel them to the parent state, the state of asylum would be violating a humanitarian duty which is almost universally observed. Such an act would not be incompatible with international law, since individuals enjoy no right, *stricto sensu*, to asylum. It would, nevertheless, constitute 'a kind of back-handed extradition process,' which would be in contradiction with the principle, incorporated in practically all extradition treaties,

B. The notion of presence in the territory of another State

1. The presence of an alien

42. The second issue to consider in determining the scope of the present topic is the notion of the *presence* of an alien in the *territory* of another State.[75]

> "To be a national of a State signifies to be subjected to its legal order. Since, however, the State's legal order has a territorial sphere of application which amounts to a territorial limitation, the national can withdraw himself from the jurisdiction of his State by leaving its territory. He naturally enters immediately the territorial sphere of jurisdiction of another legal entity, because there is practically no "no man's land" anymore on this planet. It is at this moment that the individual becomes an alien in the eyes of the State the territory of which he entered, and a citizen abroad of his national State."[76]

43. The nature of the presence of an alien may fall into one of three categories, namely, (1) lawful presence, (2) transitory presence or (3) physical presence.[77]

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that states will not assist in the prosecution of political offenses against others." Lawrence Preuss, "International Law and Deprivation of Nationality", *Georgetown Law Journal,* vol. 23, 1934, pp. 250-276, at pp. 274-275 (quoting J.P. Clark, *Deportation of Aliens from the United States to Europe*, New York, 1931, at p. 405) (citations omitted).

[75] In one case, it was determined that the presence of an alien was not required for the issuance of an expulsion decree. See *Cohn-Bendit,* Conseil d'État, 9 January 1970, *International Law Reports*, vol. 70, E. Lauterpacht, C.J. Greenwood (eds.), pp. 363-364 ("Moreover the measure of expulsion which has the effect of terminating the validity of the residence permit of an alien residing in France may be taken in respect of an alien even when he has temporarily left the national territory.")

[76] Andreas Hans Roth, note 19 above, p. 34.

[77] "Persons who present themselves at the frontier of a State to be admitted have different intentions: either they may want to cross its territory in order to reach another State, perhaps staying en route for a limited period of time for business and other purposes, or they may want to stay and take up residence in that State, permanently or temporarily as the case may be. The first group is of little interest to us. The time such persons spend in the country is so short and the contact with its life and institutions so insignificant that they pass almost unnoticed. The second group, on the other hand, consists of persons whom one might call already *'subditi temporales'* of the State, a term which embraces a variety of relationships. ... Finally the third group itself is divided into two. Firstly the residents, or domiciled aliens, persons who are permitted to take up permanent abode in the country, and secondly, persons whose intention it is to remain in the State and to acquire in due time its nationality, or properly speaking the immigrants." Andreas Hans Roth, *ibid.*, pp. 34-35 (citations omitted). "It is irrelevant whether the individual concerned is passing through the territory, or is staying only temporarily, or has established residence there; these differences may be of importance, however, regarding the lawfulness of the expulsion in a concrete case since provisions of municipal law or treaties could influence the decision." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 110.

(a) Lawful presence

44. An alien who has been formally admitted to and remained within the territory of another State in accordance with its national law may be considered to be lawfully present therein. The general requirements for lawful presence may include the following: a valid passport or travel document, compliance with the conditions for entry, and compliance with the conditions for continued presence.[78] In some countries, a person who enters a country illegally may be able to subsequently acquire the status of lawful presence.[79] The action taken by the territorial State to compel the departure of legal aliens would constitute expulsion and therefore come within the scope of the present topic.

(b) Transitory presence

45. Aliens may be permitted to enter a particular area within the territory of a State for a specific purpose of limited duration without being formally admitted to the State under its immigration law.[80]

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[78] "In all the countries under review, an alien is considered to be lawfully in the territory if he possesses proper documentation (i.e. a national passport or a recognized travel document, properly visaed if required); has observed the frontier control formalities; and has not overstayed the period for which he has been allowed to stay, by operation of law, or by virtue of 'landing conditions', a residence permit, or any other authorization." Atle Grahl-Madsen, *The Status of Refugees in International Law; Asylum, Entry and Sojourn*, vol. II, Leiden, A. W. Sijthoff, 1972, pp. 347-348.

[79] "Even an alien who enters a country clandestinely may subsequently have his situation regularized and become lawfully present." Ibid., p. 348 (referring to the position of the German Bundesverwaltungsgericht in *Maxi* v. *Stadt Munchen*, 7 BVerwGE 231 (1958)).

[80] Several States grant permits to aliens for transitory travel through, or transitory admission to, its territory (*see*, e.g., Belarus, 1996 Rules, articles 1, 3 and 4; Brazil, 1980 Law, article 8; Chile, 1975 Decree, articles 50-51; China, 1986 Rules, article 9; Japan, 1951 Order, articles 14-15; Malaysia, 1963 Regulations, articles 12 and 15; Nigeria, 1963 Act, articles 11 and 27, and 1963 Regulations (L.N. 93), articles. 6, 7(1), 8(1) 13; Republic of Korea, 1992 Act, articles 14-16; Russian Federation, 1996 Law, article 29; and United States, INA, Section 252). The Russian Federation does not automatically give transitory aliens an entitlement to stop (1996 Law, article 29). Several national laws require the transiting alien to present or carry certain documents such as a valid passport or permit (*see*, e.g., Belarus, 1996 Rules, articles 1-6, 11, and 13, and 1993 Law, article 22; Finland, 2004 Act, section 11(1); Japan, 1951 Order, article 3; Nigeria, 1963 Act, article 9(3)(d); 1963 Regulations (L.N. 93), articles 8(1) and 13, and 1963 Regulations (L.N. 94), articles 18 and 23(d); Portugal, 1998 Decree-Law, article 12; and Russian Federation, 1996 Law, articles 29 and 31). An alien's transitory status, rights or obligations may be affected by: (1) the alien's means of transport, such as air (Belarus, 1996 Rules, article 5; China, 1986 Law, article 6, and 1986 Rules, article 8; Japan, 1951 Order, article 16; Nigeria, 1963 Act, article 52(2); and Russian Federation, 1996 Law, article 31), motor car (Belarus, 1996 Rules, article Art. 8; Ecuador, 2004 Law, article 12; and Russian Federation, 1996 Law, article 29), railway train (Belarus, 1996 Rules article 10) or boat (China, 1986 Rules, article 9; Japan, 1951 Order, article 16; and Nigeria, 1963 Act, article 52(2)); and (2) international treaties or agreements entered into by the State, including those concluded with the State in which the alien is a citizen or resident, or which has provided the alien with the relevant travel documents (Belarus, 1996 Rules, articles 1-2, and 5-6; China, 1986 Law, article 32; and Russian Federation, 1996 Law, articles 29 and 31).

The limitations imposed upon the transitory presence of an alien[81] as well as the possible causes of the termination of the transitory status of an alien[82] vary considerably from one State to another.

46. The notion of transitory presence applies primarily to two special categories of aliens, namely, (1) passengers who remain for a brief period in the transit area of an international transportation facility, such as an airport, before continuing to their final destination in another State; and (2) crew members of ships and aircraft who travel through or remain for a brief period in the vicinity of an airport or seaport in the territory of another State.

47. In the first case, passengers who remain in an international transportation facility while awaiting their departure to another State do not pass through immigration and therefore are not formally admitted to the State.[83] Transit passengers who refuse to continue to their final destination and seek to remain in the territory of the State would more likely be subject to non-admission rather

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[81] The transitory presence of an alien may be restricted to: (1) a certain territorial area or location beyond the vessel, such as a city, airport or train station (Belarus, 1996 Rules, articles 5 and 10; China, 1986 Law, article 6, and 1986 Rules, articles 8-9; Ecuador, 2004 Law, article 12; Japan, 1951 Order, articles 14 and 16; Nigeria, 1963 Act, article 9(3)(d); Republic of Korea, 1992 Act, articles 14-16; and Tunisia, 1968 Law, article 7); (2) a maximum duration of permitted stay (Belarus, 1996 Rules, articles 5, 7, 11 and 13; Brazil, 1980 Law, article 8; Chile, 1975 Decree, article 50; China, 1986 Law, article 6, and 1986 Rules, articles 8-9; Japan, 1951 Order, articles 14-16; Malaysia, 1963 Regulations, articles 12(2) and 15(2); Nigeria, 1963 Act, articles 9(3)(d), 11(3)(b) and 27(3)(b), 1963 Regulations (L.N. 93), article 6(2)-(3), and 1963 Regulations (L.N. 94), articles 18 and 23(d); Republic of Korea, 1992 Act, articles 14-16; Russian Federation, 1996 Law, articles 31-32; United Kingdom, 1971 Act, Section 8(1); and United States, INA, Section 252); (3) entry and exit at specified ports or other border points (China, 1986 Law, article 6; Nigeria, 1963 Act, articles 9(3)(d), 11(1)(a), 27(1)(a) and 52(1)); (4) a specified route of travel out of the State's territory (Belarus, 1996 Rules, articles 7-8 and 11, and 1993 Law, article 22; and Japan, 1951 Order, articles 15-16); or (5) certain places at which the alien may lawfully stop or seek services along the route (Belarus, 1996 Rules, articles 8-9, 11-12 and 15).

[82] In particular, if an alien changes the means or individual vehicle of transport between entry and exit, including by remaining after the departure of the alien's vessel, this may (Chile, 1975 Decree, articles 51 and 85; China, 1986 Rules, article 9; Malaysia, 1963 Regulations, article 15(2); Nigeria, 1963 Act, articles 11(2)(b) and 27(2)(b); United Kingdom, 1971 Act, Section 8(1); United States, INA, Sections 101(a)(15)(D) and 252) or may not (Japan, 1951 Order, article 16; Republic of Korea, 1992 Act, article 14) cause the alien to lose transitory status.

[83] This principle is intended to facilitate international travel. It may apply to airports, train stations or seaports. For a general discussion of passengers in transit, *see* Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 345. "In *D. v. the United Kingdom* (judgment of 2 May 1997, Reports of Judg. and Dec. 1997-111 No. 37. para. 48), the Court explained that even if the applicant never entered the United Kingdom in the technical sense, he had been within the jurisdiction, in custody, at Gatwick airport, and for the Court it was sufficient that 'he had been physically present there'." Hélène Lambert, *The Position of Aliens in Relation to the European Convention on Human Rights (La situation des étrangers au regard de la Convention Européenne des Droits de l'Homme),* Human Rights Files, No. 8, Revised 2nd ed., Council of Europe Publishing, 2001, pp. 51-52, n. 14.

than expulsion since they have not been formally admitted to the State.[84] Thus, the compulsory departure of transit passengers would appear to be outside the scope of the present topic.

48. In the second case, crew members are subject to their own travel regimes, which are intended to facilitate their transit through foreign countries.[85] The removal of crew members who remain in the territory of another State beyond the permitted period is usually achieved by means of special procedures rather than the general procedure for the expulsion of aliens.[86] Thus, the compulsory departure of crew members would also appear to be outside the scope of the present topic.

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[84] "When a man presents himself at an airport in this country seeking leave to land here, it is not necessary for the immigration officer to grant or refuse it at once. The matter may be in suspense whilst inquiries are made, or, as here, when he [the alien] is not fit to receive a communication. So in the case of a shipwrecked mariner who was rescued from the sea, the question of leave to land might not be determined for a few days. The leave to land might be in suspense, but eventually when it is refused, it is refused, and that is all that matters. So here there may have been an intervening time ..." Court of Appeal, *Regina* v. *Secretary of State for Home Affairs,* ex parte *Soblen,* [1962] 3 All E.R. 379, 33 ILR 245, p. 252, Lord Denning M.R. (for the Court). "... it is common ground that the plaintiff was a man to whom the immigration officers had been instructed to refuse leave to land in this country .... He landed, it is true, without having obtained leave to do so, but he landed, as I find—and as, indeed, very soon became apparent to the immigration authorities—from an aircraft at an approved port for the purpose only of embarking in an aircraft at the same port. In these circumstances, under the provisions of article 2 (I) *(b)* [of the Aliens Order, 1953], his landing was lawful, as no leave to land in those circumstances... is required .... It is quite clear that leave to land was at no time either given or refused." High Court of Justice (Queen's Bench Division) in *Kuchenmeister* v. *Home Office and Another,* [1958] I All E.R. 485, (1958-ii) *26* ILR 466, Barry J. This case involved "an alien who was detained for some hours at London Airport because the immigration officers would not allow him to proceed from one section of the airport to another section, where he should embark in a connecting aircraft. As a result he missed the plane and had to stay at the airport until the next day." Atle Grahl-Madsen, note 78 above, p. 341.

[85] "Although not at first sight within the same class as diplomats and international officials, the crewmembers of ships and aircraft also benefit from their own travel regime. The International Civil Aviation Organization and the Intergovernmental Maritime Consultative Organization have both pioneered the widespread adoption of international standards and practices regarding the movement of seamen and aircrews." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 156. *See* Convention concerning Seafarers' National Identity Documents Convention, Geneva, 13 May 1958, United Nations, *Treaty Series*, vol. 389, No. 108, p. 277; Convention on Facilitation of International Maritime Traffic, London, 9 April 1965, United Nations, *Treaty Series*, vol. 591, No. 8564, p. 265. "Certain categories of people are nevertheless either exempt from control on entry or enjoy privileges when seeking entry into a foreign state's territory. This is the case, for instance ... of crew members, on the basis of bilateral then multilateral treaties." Hélène Lambert, note 83 above, p. 11 (citation omitted).

[86] "International organizations have done much to establish a rational regime facilitating the temporary entry and sojourn of crewmembers. The primary intention has been to expedite international travel and to prevent unnecessary delays owing to immigration procedures. Seen in this light, it is perhaps not surprising that entry facilities for crewmembers have been balanced by rigorous measures for the removal of those who remain behind." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 158 (citation omitted).

(c) Physical presence

49. An alien who crosses the border of a State of which he or she is not a national without being formally admitted or entering[87] in accordance with its national immigration law is nonetheless physically present therein.[88] There is some question as to whether the action taken by the territorial State to compel the departure of illegal aliens constitutes expulsion rather than another procedure such as non-admission.[89] The alien may be considered to be present in the territory as a matter of fact but not as a matter of law. [90] In such a case, the national law relating to denial of entry or admission would apply. The substantive and procedural requirements for admission and expulsion are generally not the same. States usually have broader discretion and provide fewer procedural guarantees in addressing requests by aliens for admission or entry. The status of an illegal alien and the procedure for compelling the departure of such an alien may vary depending on the national law of the State concerned. Thus, the procedure may be designated as expulsion, non-admission or otherwise under national law.[91]

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[87] See, for example, *Seyoum Faisa Joseph v. U.S. Immigration & Naturalization Service,* U.S Court of Appeals, 4th Circuit, 20 May 1993 [No. 92-1641] ("'Entry' in the context of the INA is a term of art. 8 U.S.C § 1101(a)(13) (1988). Physical presence alone is not sufficient to constitute an 'entry.' Rather, in order to establish an 'entry' into the United States, an alien must show: (1) physical presence in the United States; (2)(a) inspection and admission by an immigration officer, or (b) actual and intentional evasion of inspection; and (3) freedom from official restraint.") (Citations omitted.)

[88] "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing ..." *Shaughnessy v. Mezei*, United States Supreme Court, 16 March 1953 [345 U.S. 206] (quoted from (1953) 20 ILR 264, p. 267) (citations omitted). "It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission ... and those who are within the United States after an entry, irrespective of its legality." *Leng May Ma* v. *Barber,* 357 U.S. 185 (1958) (quoted from (1958-II) 26 ILR 475, pp. 475-476) "For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States." *Leng May Ma* v. *Barber,* 357 U.S. 185 (1958) (quoted from (1958-II) 26 ILR 475, p. 476) "Entry into a territory is effected by crossing the frontier-line and thus setting foot on the territory. At that moment one has come under the territorial jurisdiction of the State concerned—a jurisdiction which extends right to the frontier-line but no further." Atle Grahl-Madsen, note 78 above, p. 223.

[89] "Where an alien has entered the territory illegally and without realization of this fact by the national authorities, and afterwards is deported, it may be somewhat doubtful whether this State action constitutes an expulsion or a non-admission. However, the difference is only a question of terminology, because the legal consequence in both cases can be coercive deportation." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 110.

[90] "But mere physical presence on a State's territory does not always or in all respects make a person a subject of the law of the land." Atle Grahl-Madsen, note 78 above, p. 334.

[91] *See* Part III.C.1 (b) and Part X.A.

> "States lay down in their municipal law the conditions under which aliens may enter their territory. Generally, such laws require identification by passport, and reserve the right to grant special permission by issuing visas. An unlawful entry can result in the expulsion of the foreigner on the ground that the entry was not justified. The question whether the foreigner can claim judicial protection before national courts to contest the non-admission can only be answered by application of the rules of the national legal system concerned. Even if a State does not grant judicial protection in cases of non-admission and treats the administrative decision as final, no violation of international customary law arises."[92]

50. The question arises as to whether the scope of the present topic should be limited to the expulsion of aliens who are lawfully present in the territory of another State or be extended to include illegal aliens who are physically present therein. The narrower approach to the topic would presumably be less complicated and more expeditious. However, this approach would not address a situation which is of significant practical importance given the frequency with which it occurs.[93] The broader approach to the topic may require consideration of the notion of an "illegal alien" as well as the substantive and procedural conditions required for the expulsion of such aliens as compared to those who are lawfully present in the State.

2. The territory of a State

51. The notion of the territory of a State for purposes of exercising jurisdiction or incurring responsibility under international law may be somewhat broader than the borders of the State established for purposes of immigration control under national law. As recognized by the International Court of Justice, the territorial sovereignty of a State includes its internal waters, territorial sea and airspace under international law: "The basic legal concept of State sovereignty in customary international law, expressed in, *inter alia*, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory."[94]

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[92] Karl Doehring, "Aliens, Admission", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 107-109, at p. 108.

[93] "Expulsion is generally a measure that States use for combating illegal immigration, although it may also affect legal immigrants." Giorgio Gaja, note 28 above, p. 289.

[94] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 111, para. 212. "Territorial sovereignty extends principally over land territory, the territorial sea appurtenant to the land, and the seabed and subsoil of the territorial sea. The concept of territory includes islands, islets, rocks, and reefs." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 105 (citations omitted). "Internal waters, lying behind the baselines used to delimit territorial waters, are completely within the jurisdiction of the State. The territorial sea also is an area over which the coastal State exercises full sovereignty and in which, subject to the requirements of innocent passage, all the laws of the coastal State may be made applicable. The sovereignty here exercised is no different in kind from that over State territory." Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Oxford, Clarendon Press, 1996, pp. 162-163. *See also* Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 572.

52. The notion of the territory of a State for purposes of determining whether an alien has entered or been admitted to a State may be limited to its land territory and internal waters. Thus, there may be a distinction between the entry of an alien into the territory of a State as a matter of fact based on the territorial limits of a State and as a matter of law based on the points of entry identified for purposes of immigration control. The border of a State for purposes of immigration control will most likely be determined in the national law of the State in the context of the application of its immigration law.

> **"Although the territorial limits of a State run to the boundaries of its territorial sea, it does not follow that entry within the latter constitutes entry within the State, where 'entry' is the juridical fact necessary and sufficient to trigger the application of a particular system of international rules, such as those relating to landings in distress or immunity for illegal entry. States generally apply their immigration laws, not within territorial waters, but within internal waters, even though it may be argued that 'entry' occurs at the moment when the outer limit of the territorial sea is crossed."[95]**

53. The distinction between the entry of an alien into the territory of a State as a matter of fact or as a matter of law may be important for purposes of determining: (1) the possibility of intercepting and sending away illegal or otherwise undesirable aliens before they have crossed the border for purposes of immigration;[96] or (2) the possibility of compelling the departure of an illegal or otherwise undesirable alien by means of non-admission rather than expulsion after they have crossed the border.[97]

3. Special situations

54. In principle, aliens are subject to the jurisdiction of the State in which they are present.[98] However, there are a number of cases in which the presence of an alien in the territory of another State may raise special jurisdictional issues. These exceptional cases would appear to be governed by special rules of international law (*lex specialis*) other than those relating to the expulsion of aliens and therefore be beyond the scope of the present topic.

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[95] Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Oxford, Clarendon Press, 1996, p. 163 (citation omitted).

[96] *See* Part III.B.4.

[97] *See* Part III.C.1(b).

[98] "The fact that every state exercises territorial supremacy over all persons on its territory, whether they are its nationals or aliens, excludes the exercise of the power of foreign states over its nationals in the territory of another state." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 901.

(a) Premises subject to the principle of inviolability

55. There are areas within the territory of a State which are subject to the principle of inviolability as a matter of international law, notably diplomatic premises, consular premises, special mission premises and international organization premises. In some cases, individuals have been granted refuge in such places. The individuals seeking refuge are usually nationals of the territorial State. However, aliens have also sought refuge in such a place.[99] This practice has been referred to as "extraterritorial asylum"[100] or, when the person seeks refuge in diplomatic premises, "diplomatic asylum".[101] The

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[99] "A somewhat special case occurred in the 1980s when large numbers of nationals of the German Democratic Republic, for whom emigration was mostly illegal, virtually invaded the embassies of the Federal Republic of Germany in various East European states, particularly in Czechoslovakia, in order to seek permission to live in the Federal Republic (in the eyes of whose authorities those persons were German nationals, with rights as such in the Federal Republic …). Beginning in about 1984, such incidents grew in scale and frequency until, in 1989, they reached a point at which at one time over 1,000 people were camped in the grounds of the Federal Republic's embassy in Prague." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, at p. 1083, No. 3.

[100] "The term "'extra-territorial' asylum" is here used to indicate asylum given within the territory of the state from which refuge is sought. It refers to asylum in legations and consulates, and on warships and merchantmen in the ports of the state from which the individual seeking refuge is trying to escape. In this respect it differs from 'territorial' asylum, which is granted within the territory of the state which gives it. Extra-territorial asylum takes place in derogation of the territorial sovereignty of the state where it is granted. For it limits the latter's jurisdiction over all individuals on its territory, a jurisdiction which is by international law an essential attribute of state sovereignty. It is, therefore, not a practice which can be lightly followed; its legal basis must be clearly established. For it is a general principle of law that rights claimed in derogation of normal rules of international law must be clearly proved. … The question may now be considered whether the present position of asylum in legations and ships is satisfactory from the point of view of the states concerned, and particularly of those who grant it. Their aim, it has been shown, is twofold: first, to act humanely; second, not to interfere unduly in the internal affairs of another state. It has been shown that there is, in this respect, no independent principle of law which would make lawful limited infringements of state sovereignty in favour of humanitarian considerations. The practice of states has not, in this respect, sanctioned the principle of humanitarian intervention in its widest form. In practice the claim of humanitarianism is satisfied only when it does not infringe the power of the local authorities, or, as in the case of usage, when it depends on their acquiescence. Nevertheless, the exercise of asylum is liable to strain the relations between the state whose representative gives asylum and the state on whose territory it is given. … Seeing that the primary objective of a legation is the establishment of good relations, the granting of asylum would thus seem to be not only extraneous to its purpose, but to run counter to it." Felice Morgenstern, "Extra-Territorial Asylum", *British Year Book of International Law,* vol. 25, 1948, pp. 236-261, at pp. 236, 259 and 260-261 (citations omitted) (referring in part to advisory opinion of the Permanent Court of International Justice in the case of *Access of Polish War-vessels to the Port of Danzig* (*Publications of the Court,* Series A/B, No. 43, p. 142)).

[101] "The practice of granting diplomatic asylum in exceptional circumstances is of long-standing, but it is a matter of dispute to what extent it forms part of general international law. ... But as the International Court of Justice noted in the *Asylum* case: 'the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case.' Thus, in the absence of an established legal basis, such as is afforded by treaty or established custom, a refugee must be surrendered to the

ability of a State to obtain the physical custody of an alien who is present in such a place for purposes of expulsion and deportation would be governed by rules of international law concerning diplomatic relations,[102] consular relations,[103] special missions[104] and international organizations.[105]

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territorial authorities at their request and if surrender is refused, coercive measures may be taken to induce it. Bearing in mind the inviolability of embassy premises, the permissible limits of such measures are not clear." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 1082-1083 (citations omitted) (quoting ICJ Rep (1950), at p. 274).

[102] Vienna Convention on Diplomatic Relations, 18 April 1961, United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95, article 22, para. 1 ("The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission."). "Inviolability of mission premises has two distinct aspects. The first is immunity from any form of law enforcement by the authorities of the receiving State – entry, search, requisition, or even service of legal documents." Eileen Denza, "Diplomatic Agents and Missions, Privileges and Immunities", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1040-1045, at p. 1041.

[103] Vienna Convention on Consular Relations, Vienna, 24 April 1963, United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261, article 31:

> "1. Consular premises shall be inviolable to the extent provided in this Article.
>
> "2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action."

See Constantin Economidès, "Consular Relations", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 765-768, at p. 767.

[104] Convention on Special Missions, 8 December 1969, United Nations, *Treaty Series*, vol. 1400, No. 23431, p.231, article 25, para. 1:

> "The premises where the special mission is established in accordance with the present Convention shall be inviolable. The agents of the receiving State may not enter the said premises, except with the consent of the head of the special mission or, if appropriate, of the head of the permanent diplomatic mission of the sending State accredited to the receiving State. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the head of the special mission or, where appropriate, of the head of the permanent mission."

[105] *See*, for example, the Agreement regarding the Headquarters of the United Nations, Lake Success, 26 June 1947, approved by the General Assembly of the United Nations on 31 October 1947, United Nations, *Treaty Series*, vol. 11, No. 147, p. 11, Section 9:

> "*(a)* The headquarters district shall be inviolable. Federal, state or local officers or officials of the United States, whether administrative, judicial, military or police, shall not enter the headquarters district to perform any official duties therein except with the consent of and under conditions agreed to by the Secretary-General. The service of legal process, including the seizure of private property, may take place within the headquarters district only with the consent of and under conditions approved by the Secretary-General.
>
> *(b)* Without prejudice to the provisions of the General Convention or Article IV [*i.e.* sections 11 to 14] of this agreement, the United Nations shall prevent the headquarters district from becoming a refuge either

(b) Common carriers

56. Secondly, an airplane or a ship which has the nationality of one State[106] may be present in the territory of another State. There may be cases in which the captain of such an airplane or the master of such a ship wishes to disembark a passenger who: (1) is not a national of the territorial State; and (2) has not been granted permission to enter the territorial State other than temporarily for transit purposes (or possibly in the case of an emergency landing not at all). The alien may be considered to be in the custody of the common carrier.[107] In some situations, an airplane or ship may be treated as part of the territory of its State of nationality.[108] At the same time, a commercial aircraft or ship is generally considered to be subject to the territorial jurisdiction of the State in which it is present.[109]

57. The compulsory departure of an alien from a foreign aircraft or ship which is in the territory of another State would not appear to constitute expulsion. The alien would be physically present either

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for persons who are avoiding arrest under the federal, state, or local law of the United States or are required by the Government of the United States for extradition to another country, or for persons who are endeavoring to avoid service of legal process."

[106] "Aircraft have the nationality of the State in which they are registered." Convention on International Civil Aviation, Chicago, Annex 9 (12th ed.), art. 17. "States shall have the nationality of the State whose flag they are entitled to fly." United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, United Nations, *Treaty Series,* vol. 1834, No. 31363, p. 397, art. 91(1). *See* Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 731; and Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 3.

[107] "The custody of the alien, unless otherwise directed, is considered to be with the transportation line." Jack Wasserman, *Immigration Law and Practice,* 3rd ed., New York, The American Law Institute, 1979, p. 423 (referring to United States practice).

[108] "The first question to be answered is whether a merchant ship is part of the territory of a State. In this field there are two conflicting theories, the one stating that the ship is a floating piece of State territory and the other that a ship is only the property of a State at a place where no local jurisdiction exists. Neither theory is accepted by the majority of specialists on international law. The generally accepted view is that a merchant ship in the open sea is subject not to territorial jurisdiction but to the jurisdiction of the State of the flag. (Save in exceptional cases, activities on board a ship are subject to the jurisdiction of the state of the flag: Convention on the High Seas, Geneva, 29 April 1958, United Nations, *Treaty Series,* vol. 450, No. 6465, p. 82, Art. 6. The Convention is stated to be generally declaratory of general principles of international law.) (The problem is not 'extra-territorial' asylum in that the ships are not in the ports of the State from which the individual seeking refuge is seeking to escape. Were it so, the problem of derogations from State sovereignty over its territory would be relevant.)" Chooi Fong, "Some Legal Aspects of the Search for Admission into other States of Persons Leaving the Indo-Chinese Peninsula in Small Boats", *The British Year Book of International Law,* Oxford, University Press, vol. 52, 1982, pp. 53-108, at p. 100-101 (Nos. 3 and 4 reproduced in parentheses).

[109] Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 622; Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 85; and Atle Grahl-Madsen, *The Status of Refugees in International Law; Asylum, Entry and Sojourn,* vol. II, Leiden, A. W. Sijthoff, 1972, p. 55.

on the common carrier of a foreign State or in the international transportation facility of the territorial State. The alien would not have been formally admitted to the State or have entered the territory of the State as a matter of law. This situation would appear to be governed by rules of international law (e.g., international civil aviation law[110] or international maritime law[111]) other than those relating to the expulsion of aliens. Thus, these cases involving the compulsory departure of an alien from a foreign aircraft or ship would not appear to be within the scope of the present topic.

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[110] Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963, United Nations, *Treaty Series*, vol. 704, No. 10106, p. 219, articles 6(1), 8(1) and (2), and 14 (1) and (2):

> Article 6
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> "1. The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1, impose upon such person reasonable measures including restraint which are necessary:
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> *(a)* to protect the safety of the air craft, or of persons or property therein; or
>
> *(b)* to maintain good order and discipline on board; or
>
> *(c)* to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter."
>
> Article 8
>
> "1. The aircraft commander may, in so far as it is necessary for the purpose of subparagraph *(a)* or *(b)* of paragraph 1 of Article 6, disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in Article 1, paragraph 1 *(b)*.
>
> "2. The aircraft commander shall report to the authorities of the State in which he disembarks any person pursuant to this Article, the fact of, and the reasons for, such disembarkation."
>
> Article 14
>
> "1. When any person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, or has disembarked after committing an act contemplated in Article 11, paragraph 1, and when such person cannot or does not desire to continue his journey and the State of landing refuses to admit him, that State may, if the person in question is not a national or permanent resident of that State, return him to the territory of the State of which he is a national or permanent resident or to the territory of the State in which he began his journey by air.
>
> "2. Neither disembarkation, nor delivery, nor the taking of custody or other measures contemplated in Article 13, paragraph 2, nor return of the person concerned, shall be considered as admission to the territory of the Contracting State concerned for the purpose of its law relating to entry or admission of persons and nothing in this Convention shall affect the law of a Contracting State relating to the expulsion of persons from its territory."

[111] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988, United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201, art. 8:

> "1. The master of a ship of a State Party (the "flag State") may deliver to the authorities of any other State Party (the "receiving State") any person who he has reasonable grounds to believe has committed one of the offences set forth in article 3.
>
> "2. The flag State shall ensure that the master of its ship is obliged, whenever practicable, and if possible before entering the territorial sea of the receiving State carrying on board any person whom the master intends to deliver in accordance with paragraph 1, to give notification to the authorities of the receiving State of his intention to deliver such person and the reasons therefor.

(c) Warships

58. Warships are entitled to special privileges and immunities when present in foreign waters which limit the ability of the territorial State to obtain custody of aliens (even non-crew members) who are present on such a ship.[112]

(d) Military bases

59. The military base or other premises of the members of the armed forces of a State in the territory of another State may be inviolable.[113] In time of peace, the armed forces of a State may be

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"3. The receiving State shall accept the delivery, except where it has grounds to consider that the Convention is not applicable to the acts giving rise to the delivery, and shall proceed in accordance with the provisions of article 7. Any refusal to accept a delivery shall be accompanied by a statement of the reasons for refusal.

"4. The flag State shall ensure that the master of its ship is obliged to furnish the authorities of the receiving State with the evidence in the master's possession which pertains to the alleged offence.

"5. A receiving State which has accepted the delivery of a person in accordance with paragraph 3 may, in turn, request the flag State to accept delivery of that person. The flag State shall consider any such request, and if it accedes to the request it shall proceed in accordance with article 7. If the flag State declines a request, it shall furnish the receiving State with a statement of the reasons therefor."

[112] "Warships in foreign waters were formerly frequently referred to as, in a sense, 'floating portions of the flag state'. The fiction of extraterritoriality implied in that view was rejected in *Chung Chi Cheung v The King* [[1939] AC 160]. Nevertheless, a warship has a special status and privileges. Being a state organ, a warship benefits from that state's sovereign immunity from the jurisdiction of other states. A warship with all persons and goods on board, remains under the jurisdiction of her flag-state even during her stay in foreign waters. No legal proceedings can be taken against her either for recovery of possession, or for damages for collision, or for a salvage reward, or for any other cause. No official of the littoral state is allowed to board the vessel without special permission of the commander … Even individuals who do not belong to the crew but who, after having committed a crime on the territory of the littoral state, have taken refuge on board, cannot be forcibly taken off the vessel; if the commander refuses their surrender, it can be obtained only by diplomatic means from his home state. As in other cases of jurisdictional immunity, the flag state of the warship may waive its privileges so as to allow the exercise of jurisdiction by the littoral state." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 1167-1169 (citations omitted). For a discussion of immunity of State ships other than warships, *see* ibid., p. 1170; and Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 31.

[113] "A question which is distinct from the exercise of jurisdiction in respect of matters internal to the administration of the force is the question whether the authorities of the receiving state have the right to enter the premises or camp occupied by the visiting force. If the matter is not regulated by treaty, the legal position is unclear, and will have to be determined in the light of whatever may reasonably be implied from the circumstances of the consent given to the force's presence in the receiving state, and in the light of the sovereign capacity in which the force will have been established. To the extent that the receiving state is

present in the territory of another State on a temporary or long-term basis with the consent of the receiving State. The presence of the armed forces is usually governed by an agreement between the States concerned. The exercise of jurisdiction by the sending or receiving State with respect to military or civilian aliens who are present in the territory of the receiving State, including on a military base[114] under the authority of the sending State, is usually governed by the terms of the agreement between the States concerned. The compulsory departure of aliens who are present on a military base operated by their State in the territory of another State would normally be governed by the terms of the agreement rather than the rules of international law relating to the expulsion of aliens.[115]

4. Interception of aliens

60. A State may take measures to prevent the entry of aliens before they cross the border and are physically present in its territory. In this regard, the extraterritorial application of immigration laws has occurred with increasing frequency in recent years with respect to the interdiction of illegal aliens attempting to reach the shores of another State by sea as well as aliens suspected of international terrorist activities travelling by any means of transportation. These issues would also appear to be

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required to respect the inviolability of the force's premises or camp, the possibility arises of their becoming a place of asylum for those seeking refuge from those authorities. This possibility is recognised in the Convention on Asylum adopted at the Sixth International American Conference in 1928 (American Journal, Suppl. 22 (1928), p 158), Convention on Asylum adopted at the Seventh International American Conference in 1933 (AJ, Suppl. 28 (1934), p 70), Convention on Diplomatic Asylum at the Tenth International American Conference adopted in 1954 (BFSP, 161 (1954), p 570), all of which apply, *inter alia*, to asylum in military camps." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 1158-1159, No. 15 and No. 16 (referring to "*Liwanag v. Hamil*, AJ, 50 (1956), p. 693, asserting that the local law applies in principle within a visiting force's base, although enforcement of the law may be restricted").

[114] "Thus, a military base on foreign territory may be defined as a delimitated site for military operations or supplies of one or more States on the territory of another. Legal title of the user of the base (the sending State) as against the territorial sovereign (the receiving State) may derive either from an international treaty or belligerent occupation. ... Under the principles of general international law the establishment of a military base on foreign territory requires in time of peace, and among friendly States in time of war also, authorization by the receiving territorial sovereign." Helmut Rumpf, "Military Bases on Foreign Territory", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 3, 1997, pp. 381-388, at pp. 381-382.

[115] "Every stationing of military forces abroad and every concession of a military base on foreign soil implies a restriction of authority on the part of the receiving territorial sovereign. The nature and extent of such a restriction of sovereignty will be determined by construction of the respective convention, agreement or supplementary agreement, or can be deduced from principles of general international law, which are often uncertain and in dispute. Even where no clause expressly reserving sovereignty to the receiving State is stipulated, modern agreements on military bases in foreign territory are, according to prevailing opinion, no longer regarded as depriving the receiving State of its formal sovereignty over the area in question." Ibid., p. 383.

beyond the scope of the present topic since they relate to the interdiction of aliens before they are admitted to a State rather than their expulsion thereafter.

(a) Illegal aliens travelling by sea

61. A State may take measures to prevent the entry of illegal aliens before they cross the border and are physically present in its territory. The interception of such aliens travelling to another country by sea has raised particular problems.[116] In the 1970s, thousands of refugees left the Indochinese peninsula by sea.[117] The arrival of such large numbers of aliens by sea created problems that were

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[116] "The large-scale exodus of refugees by boat, with the intention of seeking asylum after a journey across the high seas, raises particular problems both as regards their interception and rescue at sea and their refuge at their point of eventual landing." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 891, No. 1. "When a refugee arrives by land, the country of potential asylum has two alternatives: it may either return him to the State where he was persecuted, or send him to another country. Neither course is practicable. In the first, the principle of *non-refoulement* will have been violated whereas the second alternative may be impossible if no other nation will accept him. When the refugee arrives by sea, a third course of action is available. The authorities who do not want to admit the refugee can refuse him permission to disembark (indeed, if the refugee is not on a merchant ship, the authorities may tow his vessel out to sea). By taking such a course of action, the authorities will have shifted the burden on to the merchant ship and its crew and can exclude the refugee without waiting for another country to admit him and without resorting to the drastic step of *refoulement.*" Chooi Fong, note 108 above, pp. 95-96.

[117] "About 5,400 persons had left the Indochinese peninsula as of 1975." James Z. Pugash, "The Dilemma of the Sea Refugee: Rescue without Refuge", *Harvard International Law Journal*, vol. 18, 1977, pp. 577-604, at p. 577, No. 1. "In the spring of 1975 substantial numbers of people left Democratic Kampuchea, the People's Democratic Republic of Laos and the Socialist Republic of Vietnam in the Indo-Chinese peninsula. The outflow of displaced persons from the peninsula continued throughout 1976 and at present the numbers are estimated at some 660,000. (Monthly statistics of the U.N.H.C.R., *Refugees and Displaced Persons from Indo-China,* 31 July 1980.) Several boats carrying people from Indo-China began to arrive in the countries bordering the South China Sea in late 1975. The principal countries where these people sought refuge were Indonesia, Malaysia, the Philippines, Singapore, Thailand and the area of Hong Kong. Other persons rescued on the high seas by passing ships were admitted temporarily by countries of the first port of call such as Hong Kong, Japan and Singapore. These people came to be called boat people. (They are distinguished throughout from other Indo-Chinese people who left the peninsula by means other than small boats, e.g. overland. The main nationality is Vietnamese although a few Cambodians are also in the numbers.) The total number of boat people was stated to be 363,626, of which number 274,576 had already been accepted for resettlement or have departed for resettlement in third countries. (It is probable that the total number of boat people leaving the Indo-Chinese peninsula is considerably greater as the boats used by them are in most cases neither intended nor adapted for ocean voyages, and the number of boat people rescued by passing ships indicates that many of them could have been lost at sea. As the total number leaving Vietnam and other countries of the Indo-Chinese peninsula is unascertainable there can be no means of calculating how many have been lost at sea. The figures cited in this paper are therefore only the cases that have been brought to the notice of the U.N.H.C.R.)" Chooi Fong, note 108 above, p. 53 (citations omitted) (notes 3 and 5-6 appear in the text quoted above between parentheses).

both unique and unprecedented.[118] This situation was complicated by the duty to rescue persons at sea and the absence of the duty of a State to admit unwanted refugees as a matter of international law.[119]

62. At various times, the United States of America has been confronted with a large number of aliens attempting to reach its territory by sea.[120] In 1981, the United States initiated a program of interdicting aliens on the high seas as a means of preventing illegal aliens from reaching its

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[118] "The sea refugee is in a unique position under international law. The U.N.H.C.R. has no previous experience of refugees seeking asylum at sea, particularly in such great numbers. The function of international protection is rendered more difficult as the sea refugee, being on the high seas, is more easily ignored by States than a refugee actually in the territory or at the frontier. ... The situation of the boat people is more precarious than that of refugees presenting themselves at the frontier or within the territory of a State. The State is not in their case restrained by the refusal of another State to accept the subjects of expulsion orders, as refugees on the high seas do not impinge upon the territorial sovereignty of other States." Chooi Fong, note 108 above, pp. 95 and 106.

[119] "Ships transporting migrants are sometimes overcrowded and present dangers to their passengers. Shipmasters have a duty under international law to rescue persons on ships in distress on the high seas; and states have a duty to adopt legislation that establishes penalties for shipmasters who violate the duty to rescue. Two difficult situations arise in regard to persons rescued at sea. First, international law does not provide clear guidance on where they should be taken - possibilities include the next scheduled port of call for the vessel or the nearest port. Second, persons rescued may frequently fear return to their home states and may have valid claims to *non-refoulement* under the Refugee Convention or other human rights instruments." Alexander T. Aleinikoff, "International Legal Norms and Migration: A Report" *in* Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 1-27, at pp. 6-7 and Nos. 18-20 (citing United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, United Nations, *Treaty Series,* vol. 1834, No. 31363, p. 397, Art. 98(1); International Convention for the Safety of Life at Sea, London, 1 November 1974, United Nations, *Treaty Series,* vol. 1184, No. 18961, p. 278, Chapter V (Reg. 10); International Convention on Maritime Search and Rescue, Hamburg, 27 April 1979, United Nations, *Treaty Series*, vol. 1405, No. 23489, p. 97, Annex, Ch. 2, para. 2.1.10; and *Sale v. Haitian Centers Council, Inc*., United States Supreme Court, 21 June 1993, *International Legal Materials*, vol. 32, pp. 1042-1057, 509 U.S. 155 (1993) ("The United States Supreme Court has held that, under U.S. law, the Refugee Convention does not apply to actions of U.S. authorities beyond the territorial waters of the United States."). "Consequently, an anomaly has grown out of two generally accepted principles of international law. The master of a ship is duty bound to rescue anyone in danger of being lost at sea, but in the absence of an individual right of asylum, no State is bound to admit refugees once they have been rescued." Chooi Fong, note 108 above, p. 96 (referring to Reports of the U.N.H.C.R., particularly 'Note on Persons Leaving the Indo-Chinese Peninsula in Small Boats', U.N. Doc. A/AC.96/INF.150, U.N. Doc. HCR/155/8/77). "The refugees and the ship captains who could save them are both victims of an anomaly growing out of two well known principles of international law. It is well settled that the master of a ship is duty-bound to rescue anyone in danger of being lost at sea. It is equally well settled that a sovereign state is under no duty to admit unwanted alien refugees. The plight of the Vietnam refugee draws the two principles together into the Catch 22 of the law of the sea. The shipmaster of a freighter in waters off Indochina is obligated to rescue Vietnamese sea refugees, but no nation is bound to take the refugees once they have been rescued." James Z. Pugash, "The Dilemma of the Sea Refugee: Rescue without Refuge", *Harvard International Law Journal*, vol. 18, 1977, pp. 577-604, at p. 578 (citations omitted). See Giorgio Gaja, note 28 above, p. 291.

[120] In 1980, 125,000 Cubans left their country by sea in the "Mariel boatlift". Abby Goodnough, "Tensions rise as more flee Cuba for U.S.", *The New York Times*, 18 December 2005, pp. 1 and 44.

territory.[121] In 1994, the United States also initiated a new policy in response to the tens of thousands of Cubans who attempted to cross the Florida Straits "in make-shift rafts and in small boats".[122] Previously the United States had generally granted refugee status to Cuban nationals. The new policy permits Cubans without visas to remain in the United States once they have set foot on its territory, but returns any such aliens who are intercepted beyond its border.[123] This policy is sometimes referred to as the "wet foot, dry foot policy". The number of Cubans intercepted while attempting to reach the United States by sea in 2005 was the highest since 1994.[124] In January 2006, the United States held that Cubans who had landed on a bridge in the Florida Keys were not physically present in the United States because the bridge was not connected to the land.[125] This decision was subsequently reversed and later retracted following a settlement agreement permitting the Cubans to resettle in the United States.[126]

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[121] "The interdiction program was initiated by the President of the United States in 1981, based on a finding that the illegal migration of undocumented aliens into the United States was 'a serious national problem detrimental to the interests of the United States,' and that international cooperation to intercept vessels trafficking in such migrants was a necessary and proper means of ensuring the effective enforcement of U.S. immigration laws. The President authorized the U.S. Coast Guard to interdict flag vessels of consenting foreign governments, of which Haiti was one, and to return vessels carrying illegal emigrants to their home countries. Such actions, however, were to be taken only outside U.S. territorial waters." Monroe Leigh, "Judicial Decisions, Haitian Refugee Center Inc. v. Gracey. 600 F.Supp. 1396. U.S. District Court, D.D.C., January 10, 1985", *The American Journal of International Law*, vol. 79, 1985, pp. 744-746, at pp. 744-745 (referring to Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981), *reprinted in* 8 U.S.C. §1182 (supp. note) (1982); Exec. Order No. 12324, 46 Fed. Reg. 48,109 (1981), *reprinted in* 8 U.S.C. §1182 (supp. note) (1982)). *See also* Agreement relating to Establishment of a Cooperative Program of Interdiction and Selective Return of Persons Coming from Haiti, 23 September 1981, *International Legal Materials*, vol. 20, 1981, p. 1198.

[122] Abby Goodnough, "Tensions rise as more flee Cuba for U.S.", *The New York Times*, 18 December 2005, pp. 1 and 44.

[123] "The 1994 exodus led the United States and Cuba to agree on the wet foot, dry foot policy in 1995, ending this country's long time practice of admitting all Cuban migrants as refugees." Ibid. *See* Joint Communiqué Containing Agreement, New York, 9 September 1994, *International Legal Materials*, vol. 35, March 1996, pp. 327-330, and Cuba-United States Joint Statement on Normalization of Migration, building on the Agreement of 9 September 1994, New York, 2 May 1995, *International Legal Materials*, vol. 35, March 1996, p. 327. The Joint Communiqué provides that "… migrants rescued at sea attempting to enter the United States will not be permitted to enter the United States, but instead will be taken to safe haven facilities outside the United States. Further, the United States has discontinued its practice of granting parole to all Cuban migrants who reach U.S. territory in irregular ways". The Joint Statement further indicates that "The United States and the Republic of Cuba recognize their common interest in preventing unsafe departures from Cuba. Effective immediately, Cuban migrants intercepted at sea by the United States and attempting to enter the United States will be taken to Cuba. Similarly, migrants found to have entered Guantanamo illegally will also be returned to Cuba. The United States and the Republic of Cuba will cooperate jointly in this effort. All actions taken will be consistent with the parties' international obligations. Migrants taken to Cuba will be informed by United States officials about procedures to apply for legal admission to the United States at the U.S. Interests Section in Havana. The United States and the Republic of Cuba will ensure that no action is taken against those migrants returned to Cuba as a consequence of their attempt to immigrate illegally. Both parties will work together to facilitate the procedures necessary to implement these measures. The United States and the Republic of Cuba agree to the return to Cuba of Cuban nationals currently at Guantanamo who are ineligible for admission to the United States."

[124] "Coast Guard data show that as of Friday [16 December 2005], 2,683 Cubans had been intercepted at sea this year, nearly double the number for all of 2004. … The number of Cubans being intercepted is by far the highest since 1994, when 37,000 took to the Florida Straits after Mr. Castro announced that his government would no longer stop boats or rafts leaving the island." Abby Goodnough, "Tensions rise as more flee Cuba for U.S.", *The New York Times*, 18 December 2005, pp. 1 and 44.

63. The interdiction measures taken by States in internal waters, the territorial sea[127] and even on the high seas[128] in order to prevent aliens from reaching their shore have been considered in the context of aliens seeking asylum as follows:

> "The arrival of asylum seekers by boat puts at issue not only the interpretation of *non-refoulement,* but also the extent of freedom of navigation and of coastal States' right of police and control. In South East Asia during the Indo-China exodus, States several times prevented boats landing, and towed back to the high seas many which had penetrated the territorial sea and internal waters. In 1981, the United States announced a policy of 'interdiction' on the high seas of boats which were believed to be bringing illegal aliens to the United States.
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> "The high seas, of course, are not subject to the exercise of sovereignty by any State, and ships are liable to the exclusive jurisdiction of the flag State, save in exceptional cases provided for by treaty or under general international law. The freedom of the high seas,

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[125] "MIAMI, Florida (AP) — Fifteen Cubans who fled their homeland and landed on an abandoned bridge in the Florida Keys were returned to their homeland Monday after U.S. officials concluded that the piling did not constitute dry land, authorities said. 'The historic Old Seven Mile Bridge, which runs side by side with a newer bridge, is missing several chunks, and the Cubans had the misfortune of reaching pilings from a section that no longer touches land.' The federal government said that means the group never actually reached U.S. territory, and could be sent home." *Cubans sent home after arrival at bridge piling: U.S. policy on 'wet-foot, dry-foot' called into question*, at www.cnn.com/2006/US/01/09/cubans.dryland.ap/index.html (accessed 9 January 2006).

[126] On 28 February 2006, a United States Federal Judge reversed a decision, in application of the "wet foot, dry foot policy", by immigration officials that 15 Cuban immigrants had not entered the United States upon reaching an abandoned bridge in Florida, since the bridge did not reach dry land. The judgment was subsequently retracted as part of a settlement agreement which allowed the Cubans to resettle in the United States. *Movimiento Democracia, Inc, et al. v. Chertoff*, U.S. Federal Court for the Southern District of Miami, 28 February 2006, 2006 U.S. Dist. LEXIS 8637 ("The Court finds that the historic bridge, which the State of Florida owns and pioneer Henry Flagler built to develop the tip of Florida, is indeed part of the United States despite its present lack of use. Therefore, the Coast Guard's decision to remove those Cuban refugees back to Cuba was not a reasonable interpretation of present executive policy. [...] The Court orders Defendants to use their best efforts to give Plaintiffs the due process rights to which they were entitled when they landed on the old Seven Mile Bridge on January 4, 2006.") *See* "Judge approves settlement allowing 14 repatriated Cubans to enter U.S.", South Florida Sun Sentinel, 21 March 2006, at www.sunsentinel.com/news/local/southflorida/ sfl-cmoreno21mar21,0,1638765.story?coll=sfla-news-sfla (accessed 30 March 2006).

[127] "International law nevertheless allows States to take all reasonable measures in the territorial sea to prevent the entry into port of a vessel carrying illegal immigrants, and to require such vessel to leave the territorial sea." Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Oxford, Clarendon Press, 1996, p. 164.

[128] *See* Summer L. Hackley, "Sea interdictions: are aliens apprehended on the high seas entitled to protections afforded by the Immigration and Nationality Act?", *ILSA Journal of International and Comparative Law*, vol. 6, 1999, pp. 143-156.

however, is generally expressed as a freedom common to States, while the boats of asylum seekers, like their passengers, will most usually be denied flag State protection. Similarly, the right of innocent passage for the purpose of traversing the territorial sea or entering internal waters is framed with normal circumstances in mind. A coastal State may argue, first, that boats of asylum seekers are to be assimilated to ships without nationality and are subject to boarding and other measures on the high seas. Additionally, it may argue that existing exceptions to the principle of freedom of navigation, applying within the territorial sea and the contiguous zone, justify such preventive measures as the coastal State deems necessary to avoid landings on its shores."[129]

64. The issue of whether measures taken with respect to "boat people" should be considered in the context of the present topic has been raised. These measures taken by a State to prevent the arrival of aliens who are not yet physically present within its territory would appear to be governed by rules of international law other than those relating to the expulsion of aliens.[130] Such issues would therefore appear to be beyond the scope of the present topic.[131]

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[129] Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Oxford, Clarendon Press, 1996, p. 161 (citations omitted).

[130] "Under the United Nations Convention on the Law of the Sea (UNCLOS) and customary maritime law, states are entitled to enforce domestic laws, including immigration and criminal laws, on ships bearing their own flags, stateless ships, and any ships in their territorial seas, subject to the right of innocent passage. UNCLOS extends the right to enforce certain types of domestic law, including immigration controls, to ships in 'contiguous zones' (which extend an additional twelve nautical miles from the end of the territorial sea). In these circumstances, therefore, states may interdict ships in order to search for illegal migrants, including persons deemed security threats, such as criminals and terrorists. On all other waters (including the high seas, 'exclusive economic zones,' and 'continental shelf' zones as defined by the UNCLOS), maritime law generally forbids states from interfering with foreign flag vessels unless the flag state consents. A number of states interdict ships bearing illegal migrants on the high seas as a matter of regular policy, either by seeking ad hoc consent from the flag states (if any) of offending vessels or by invoking standing bilateral treaties or memoranda of understanding allowing such actions. The resulting patchwork of such agreements cannot, however, guarantee security where flag states refuse to cooperate. The Migrant Smuggling Protocol sets out a framework among State Parties for seeking permission to board and search vessels suspected of smuggling migrants. While it does not expressly provide that such permission must be granted, the Protocol will require that parties respond to any such requests 'expeditiously' and that parties generally 'cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea.'" David Fisher, S. Martin and A. Schoenholtz, "Migration and Security in International Law" in Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 87-120, at p. 94 (citing, *inter alia*, United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, United Nations, *Treaty Series*, vol. 1834, No. 31363, p. 397, arts. 2, 33(1) and 92; Convention on the High Seas, Geneva, 29 April 1958, United Nations, *Treaty Series*, vol. 450, No. 6465, p. 82, Art. 6; United States Executive Order No. 4685 (29 September 1981) ("authorizing the interdiction of vessels carrying illegal aliens to the United States") and Order No. 12807 (24 May 1982); and Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, No. 39574, *International Legal Materials*, vol. 40, 2001, p. 335 (not yet in force); and Gary W. Palmer, "Guarding the Coast: Alien Migrant Interdiction Operations at Sea " *Connecticut Law Review*, 1997, vol. 29, pp. 1565, 1567-1568 (paragraph indentation omitted).

[131] "States increasingly seek to project enforcement of their immigration laws beyond their borders, deterring unlawful entries by sea and air. Under customary and conventional international law, state authorities may stop

(b) Aliens suspected of international terrorism

65. A State may take measures to prevent the entry of aliens suspected of international terrorism before they cross the border and are physically present in its territory. States have taken such measures with greater frequency since the bombing of the World Trade Center in New York on 11 September 2001.

> "In addition to extending the reach of criminal and terrorism law, states are increasingly seeking to enforce their domestic immigration laws beyond their own borders. These immigration laws directly promote state security by barring entry of suspected terrorists, spies, saboteurs, and criminals. However, the doctrine of state sovereignty generally precludes a state from enforcing its laws on the territory, or within the exclusive jurisdiction, of another. There are two emerging areas of exception from this rule.
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> "Carrier Sanctions and Departure Site Inspections
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> "Although originally conceived as a means of controlling illegal immigration, carrier sanctions and departure site inspection policies have recently been promoted as national security measures, especially since the attacks of 11 September 2001. Both types of policies are also emerging from the sphere of domestic law to the international level. […]
>
> "Maritime enforcement
>
> "In addition to formalizing carriers' responsibilities, states are increasing their cooperation with each other in guarding against unauthorized entry by sea. In the 1990s, maritime smuggling and trafficking of migrants rose to the fore of international interest. Since 11 September 2001, interdiction of terrorists at sea has gained equal prominence. However, the international law in this area remains less developed."[132]

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and board ships bearing their flags, stateless ships, and ships that have entered their territorial waters. States may enforce their immigration laws on ships in international waters flying foreign flags only with the consent of the flag state." Alexander T. Aleinikoff, note 119 above, p. 6 and n. 17 (citing Convention on the High Seas, Geneva, 29 April 1958, United Nations, *Treaty Series*, vol. 450, No. 6465, p. 82; and United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, United Nations, *Treaty Series*, vol. 1834, No. 31363, p. 397, Art. 98(1).

[132] David Fisher et al., note 130 above, pp. 91 and 94 (citing United Nations High Commission for Refugees Executive Committee, Interception of Asylum-Seekers and Refugees: The International Framework and recommendations for a Comprehensive Approach, 9 June 2000, EC/5/SC/CRP.17) (other citations omitted). "The United States is currently studying a proposal to 'regularly board and search suspicious vessels on the high seas around the world even when permission is not granted' as part of its 'war on terrorism.' Although the parameters of the proposal are not yet publicly available as of the writing of this chapter, it is safe to assume that at least one motivating force is the desire to halt terrorists from reaching American shores by sea. It is also safe to assume that if the United States undertakes such a policy, other states will follow suit. "Legal authority for such a policy is unclear. In 1992, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, pertaining to terrorist acts committed at sea, entered into force. However, that treaty

66. Increasing national security concerns of States with respect to the threat of international terrorism has become an important consideration in the recent practice of States with respect to the expulsion of aliens. However, the measures taken by a State to prevent suspected terrorists from entering its territory would appear to be governed by the rules of international law governing the admission of aliens and in some circumstances the extraterritorial application of national immigration laws[133] rather than the law relating to the expulsion of aliens who are already present in the territory of a State. These measures would therefore appear to be beyond the scope of the present topic.

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was not meant to address the question of interdiction of ships ferrying terrorists to coastal states. Thus, any state pursuing a policy for interdicting vessels on the high seas would have to rely on customary international law or, potentially, the laws of war.

"... Some scholars have argued that terrorism has been so universally condemned that it too has reached the level of *jus cogens* and universal jurisdiction. By extension, a state might assert a right to intercept ships suspected of carrying terrorists to its borders. However, this is far from settled law. "Further legal grounds for intercepting terrorists at sea may be derived from the laws of war and the doctrine of self-defense recognized by the United Nations Charter. Article 51 of the United Nations Charter recognizes states' inherent right to defend themselves against an 'armed attack' *('agression armée')* by other states. The United States has asserted that the events of 11 September 2001 constituted such an attack, even though it was carried out by a terrorist organization rather than directly by a state. Precedent from the International Court of Justice suggests that attacks by such independent networks may not trigger the right to self-defense under the Charter. However, recent practice ... indicates[s] that a contrary consensus is forming. As a lawful belligerent, the United States would have the right under the laws of naval warfare to intercept vessels - even those under neutral state flags - suspected of carrying 'enemy' personnel. Other states that have not been the object of such terrorist attacks might have to rely on the controversial doctrine of 'anticipatory self-defense' to justify similar interdictions." Ibid., pp. 95-96 (citing, *inter alia*, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988, United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201, art. 9 ("Nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag."); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 111; S.C. Res. 1368, U.N. SCOR, 56th Sess., 4730th mtg. at 1, U.N. Doc. S/RES/1368 (2001). Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the President of the Security Council, S/2001/946 (2001) ("notifying the Security Council of the United States' intention to act in self defense against al Quaeda and the Taliban"); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. At 1, U.N. Doc. S/RES/1373 (2001) ("reaffirming that the right to self-defense applies to terrorist attacks"); Statement of the Ministerial Meeting of the North Atlantic Council, 6 December 2001, M-NAC-2 (2001) p. 159; *Terrorist Threat to the Americas*, Res. 1, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs Acting as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, OAS Doc. OEA/Ser.F/II.24/RC.24/RES.1/01 (21 September 2001); Prime Minister Media Release, *Application of ANZUS Treaty to Terrorist Attacks on the United States*, 14 September 2001, at www.pm.gov.au/news/mediareleases/ 2001/media.releasel241.htm.

[133] "States have also begun to allow departure site inspections by destination-state personnel. In 1996, the European Union adopted a policy allowing states to post 'Airline Liaison Officers' (ALOs) abroad for purposes of advising air carriers about the authenticity of specific travel documents. The United Kingdom, the Netherlands, Germany, and Denmark have all posted such officers in their embassies in refugee-producing countries. [...] Similarly, the United States has established 'preinspection stations' through bilateral agreement in several other countries, allowing Immigration and Naturalization Service staff to inspect persons prior to departure to the United States. [...] Human rights organizations are concerned that forcing carriers to verify

C. The notion of expulsion

1. Expulsion

67. The third issue to consider in determining the scope of the present topic is the type of conduct by a State which constitutes expulsion.[134] The notion of expulsion may be understood as referring to the exercise of the right or power of a State to require an alien to leave its territory when his or her continuing presence is contrary to the interests of the territorial State.[135] A State usually exercises this right or power in the form of a decision or order issued by the appropriate judicial or administrative body in accordance with its national law.

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travel documents at the point of departure impinges upon the rights of refugees trying to flee persecution because airline employees are neither qualified nor mandated to perform screening for any other protected status. Similar concerns have been voiced about ALOs and preinspection officers, who are reportedly not trained to solicit or respond to asylum requests. Without measures to ensure responsibility for the protection of persons seeking to flee, extraterritorial screening methods may conflict with states' responsibilities under human rights and refugee law ..." David Fisher et al., note 130 above, p. 93 (citing, *inter alia*, Joint Position of 25 October 1996 Defined by the Council on Pre-Frontier Assistance and Training Assignments, 1996 *Official Journal* L281/1; Chicago Convention, Annex 9, at article 3.40.2; Agreement Between the United States of America and Ireland on Preinspection, 25 June 1986, *TIAS* No. 11379; Agreement on Preinspection Between the United States of America and the Netherlands in Respect of Aruba, 16 June 1987, *TIAS* No. 11275; Human Rights Watch, "Special Issue - Refugees, Asylum-Seekers and Displaced Persons," *in World Report 2000*, www.hrw.org/wr2kl/special/refugees2.html; Amnesty International, *No Flights to Safety - Carrier Sanctions: Airline Employees and the Rights of Refugees* (1997), www.amnesy.org; and J. Morrison, *The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy* (July 2000), p. 41 (www.unhcr.ch)).

[134] "This study also takes into consideration those cases in which, in accordance with the existing national laws and regulations, the departure of undesirable immigrants is enforced without application of the regular expulsion procedure, i.e., when aliens against whom an expulsion order is envisaged or made are allowed to leave the country voluntarily, or when aliens are, through administrative decisions, excluded from the country (without being formally expelled) ..." United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955 (ST/SOA.22 and Corr.2 (replaces Corr.1)), para. 5. "In the context of this study I shall use the word 'expulsion' to mean any measure aiming at removing an alien from the territory in which s/he is present, i.e., deportation (including reconduction à la frontière – the accompanying of a person to the border of the expelling country), extradition and refoulement." Hélène Lambert, note 83 above, p. 60, n. 130.

[135] "By expulsion is meant an act of a public authority by which an alien is requested under threat of penalty, and, if necessary, compelled to leave the territory of the country of his residence or stay." United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955, pp. 1-77. (ST/SOA.22 and Corr.2 (replaces Corr.1)), para. 1, p. 1. "The word 'expulsion' is commonly used to describe that exercise of State power which secures the removal, either 'voluntarily', under threat of forcible removal, or forcibly, of an alien from the territory of a State." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 201. "Expulsion is the getting rid of an alien whose continued presence within the territory is deemed to be highly detrimental to its welfare." S.K. Agrawala, *International Law Indian Courts and Legislature*, Bombay, N.M. Tripathi Private Ltd., 1965, p. 186 (citation omitted).

(a) Constructive expulsion

68. The compulsory departure of an alien may also be achieved by a State by means of coercive acts or threats that are attributable to the State rather than a formal decision or order.[136] In some cases, aliens have been compelled to leave a country under the guise of a "voluntary departure program" which was in fact compulsory.[137] These coercive measures which deprive an alien of any real choice other than to leave the country are sometimes referred to as "constructive expulsion".

69. The Iran-United States Claims Tribunal has addressed a number of claims relating to "constructive expulsion". The two essential elements of the notion of "constructive expulsion" that emerge from the relevant decisions of the Tribunal have been summarized as follows:

> "Such cases would seem to presuppose at least (1) that the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and (2) that behind the events or acts leading to the departure there is an intention of having the alien ejected and these acts, moreover, are attributable to the State in accordance with principles of state responsibility."[138]

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[136] "First of all, expulsion of an individual from the territory of a State presupposes that the individual in question is forced to leave that territory because the State concerned so determines. In other words, the individual would not leave were it not for the expulsion. […] Does expulsion necessarily presuppose a formal measure? Should one refer to expulsion also in the case when a State creates conditions of life that make it impossible for an individual to stay? Functionally, there seems to be little difference between the State taking a formal measure of expulsion and an equivalent conduct designed to turn an individual out of the territory. The individual has to leave any way. It seems reasonable to encompass both cases within the concept of expulsion. […] When no formal measure is adopted by the State, it is necessary to establish whether the conduct that causes the individual to leave is attributable to that State." Giorgio Gaja, note 28 above, pp. 289-290 (citing *Short v Iran* case, judgement of 14 July 1987. 16 *Iran-United States Tribunal Reports (*1987-III) 76 at 85-86; *International Technical Products Corporation and ITP Export Corporation v. The Islamic Republic of Iran,* Iran-United States Claims Tribunal, Award of 19 August 1985, *Iran-United States Claims Tribunal Reports*, vol. 9, p. 10-45, at p. 18; and *Rankin v. The Islamic Republic of Iran,* Iran-United States Claims Tribunal, Award of 3 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, pp. 135-152, at pp. 147-148.

[137] "In practice, there may be little difference between forcible expulsion in brutal circumstances, and 'voluntary removal' promoted by laws which declare continued residence illegal and encouraged by threats as to the consequences of continued residence." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 218. "State authorities can also induce expulsion through various forms of threat and coercion … In *Orantes-Hernandez* v. *Meese* 685 F. Supp. 1488 (C.D.Cor. 1988) the court found that substantial numbers of Salvadoran asylum seekers were signing 'voluntary departure' forms under coercion, including threats of detention, deportation, relocation to a remote place and communication of personal details to their government." Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Oxford, Clarendon Press, 1996, p. 155 and n. 172.

[138] David John Harris, *Cases and Materials on International Law*, 4th ed., London, Sweet & Maxwell, 1991, p. 02 (commenting on the Iran-United States Claims Tribunal cases concerning "constructive expulsion"). See also Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed., London/New York, Routledge, 1997, p. 262; John R. Crook, "Applicable law in international arbitration: The Iran-U.S. Claims

70. The Eritrea-Ethiopia Claims Commission considered the claim of Ethiopia that Eritrea was responsible for the "indirect" or "constructive" expulsion of Ethiopians contrary to international law. In rejecting this claim, the Commission concluded that the Ethiopians were not expelled by the Eritrean Government or due to government policy but instead left for other reasons such as economic factors or dislocation associated with the war, reasons for which Eritrea was not responsible. The Commission noted that there was a "spectrum of voluntariness" in such situations.

> "91. Ethiopia contended that Eritrea was internationally responsible for the damages suffered by every Ethiopian who left Eritrea during the period covered by its claims, including those not expelled by direct government action. Many departures were claimed to be 'indirect' or 'constructive' expulsions resulting from unlawful Eritrean Government actions and policies causing hostile social and economic conditions aimed at Ethiopians. Ethiopia also contended that the physical conditions of departures often were unnecessarily harsh and dangerous. Eritrea denied that it was legally responsible for Ethiopians' departures, contending that they reflected individual choices freely made by the persons concerned.
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> "92. The great majority of Ethiopians who left Eritrea did so after May 2000; claims regarding the conditions of their departures are analyzed below. As to those who departed earlier, the evidence indicates that an initial wave of 20,000 to 25,000 departures in 1998 largely resulted from economic factors. Many were port workers, most from Assab, unemployed after Eritrean ports stopped handling cargo to and from Ethiopia. A 1999 Amnesty International report in the record estimated that the closing of Assab port cost 30,000 jobs; Amnesty reported that none of the returnees it interviewed in Ethiopia during this period said that he or she had been expelled. A few thousand more Ethiopians left Eritrea during 1999; the evidence indicates that these too were mostly economically motivated. A second Amnesty report cited more than 3,000 Ethiopians who returned to Ethiopia in early 1999 due to unemployment, homelessness or reasons related to the war. Amnesty felt these did not appear to have been expelled by the Eritrean Government or due to government policy. The December 2001 UNICEF/WAT Study in Ethiopia's evidence also highlights the economic motivation of departures during this period.
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> "93. The Commission appreciates that there was a spectrum of 'voluntariness' in Ethiopian departures from Eritrea in 1999 and early 2000. Ethiopian declarants described growing economic difficulties, family separations, harassment and sporadic discrimination and even attacks at the hands of Eritrean civilians. However, the Commission is also struck that only about 70 declarations and claim forms specifically described leaving in 1998 and 1999, and of these, fewer than 20 declarants seemed to consider themselves 'expelled or deported.'

Tribunal experience", *American Journal of International Law*, vol. 83, 1989, pp. 278-311, at pp. 308-309; and Ruth L. Cove, "State responsibility for constructive wrongful expulsion of foreign nationals", *Fordham International Law Journal*, vol. 11, 1987-1988, pp. 802-838.

> "94. The Commission concludes from the evidence that departures of Ethiopians before May 2000 in very large measure resulted from economic or other causes, many reflecting economic and social dislocation due to the war, for which the Government of Eritrea was not legally responsible.
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> "95. The evidence suggests that the trip back to Ethiopia or to other destinations for those who elected to depart during this period could be harsh, particularly for those who left Assab to return to Ethiopia across the desert. However, the evidence does not establish that this was the result of actions or omissions by Eritrea for which it is responsible. Accordingly, Ethiopia's claims in this respect are dismissed." [139]

71. In considering subsequent expulsions, the Eritrea-Ethiopia Claims Commission emphasized the high legal threshold for liability for constructive expulsion based on the jurisprudence of the Iran-United States Claims Tribunal. The Commission concluded that Ethiopia had failed to meet the high legal threshold for proof of such claims as follows:

> "126. Ethiopia also contended that those who left between May 2000 and December 2000 were victims of unlawful indirect or constructive expulsion. The Parties expressed broadly similar understanding of the law bearing on these claims. Both cited the jurisprudence of the Iran-U.S. Claims Tribunal, which establishes a high threshold for liability for constructive expulsion. That Tribunal's constructive expulsion awards require that those who leave a country must have experienced dire or threatening conditions so extreme as to leave no realistic alternative to departure. These conditions must result from actions or policies of the host government, or be clearly attributable to that government. Finally, the government's actions must have been taken with the intention of causing the aliens to depart.
>
> "127. The evidence does not meet these tests. Post-war Eritrea was a difficult economic environment for Ethiopians and Eritreans both, but the Eritrean Government did not intentionally create generalized economic adversity in order to drive away Ethiopians. The Commission notes that the Government of Eritrea took actions in the summer of 2000 that were detrimental to many Ethiopians' economic interests and that there was anti-Ethiopian public opinion and harassment. Nevertheless, many Ethiopians in Eritrea evidently saw alternatives to departure and elected to remain or to defer their departures. Given the totality of the record, the Commission concludes that the claim of wide-scale constructive expulsion does not meet the high legal threshold for proof of such a claim."[140]

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[139] *Partial Award, Civilians Claims, Ethiopia's Claim 5*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 91-95 (citation omitted).

[140] Ibid., paras. 126-127 (citing Charles N. Brower & Jason D. Brueschke, The Iran-United States Claims Tribunal, pp. 343-365 (1998); George H. Aldrich, The Jurisprudence of the Iran-United States Claims Tribunal, pp. 464-471 (1996)).

72. In 1986, the International Law Association adopted the Declaration of Principles of International Law on Mass Expulsion. The definition of the term "expulsion" contained in the Declaration also covers situations in which the compulsory departure of individuals is achieved by means other than a formal decision or order by the authorities of the State. This definition encompasses situations in which a State aids, abets or tolerates acts committed by its citizens with the intended effect of provoking the departure of individuals from the territory of the State.

> "... 'expulsion' in the context of the present Declaration may be defined as an act, or failure to act, by a State with the intended effect of forcing the departure of persons against their will from its territory for reason of race, nationality, membership of a particular social group or political opinion … 'a failure to act' may include situations in which authorities of a State tolerate, or even aid and abet, acts by its citizens with the intended effect of driving groups or categories of persons out of the territory of that State, or where the authorities create a climate of fear resulting in panic flight, fail to assure protection to those persons or obstruct their subsequent return …"[141]

73. A constructive expulsion is by its terms unlawful to the extent that it does not comply with the substantive or procedural requirements for lawful expulsion and violates internationally recognized human rights, as discussed below.

(b) Non-admission

74. There may be situations in which aliens who are physically present in the territory of the State have not been formally admitted in accordance with the national immigration laws. In such cases, the alien may have entered the territory of the State as a matter of fact but not as a matter of law. There are two categories of aliens who may be in such a position: (1) passengers who arrive by airplane or ship at an international transportation facility located in the territory of the State (other than transit passengers[142]) and are denied admission; or (2) aliens who have crossed the border and entered the State without complying with the requirements for admission under its national immigration law.

75. As regards the first category, a passenger who is deemed inadmissible upon arrival would be subject to removal by the airline or other carrier at the order of the territorial State.[143] The passenger has not been formally admitted to or entered the State as a matter of law. This situation would appear to be governed by the law relating to admission rather than expulsion. The procedure for the removal

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[141] Declaration of principles of international law on mass expulsion, 62nd Conference of the ILA, Seoul, 24-30 August 1986, *Conference Report 1986*, pp. 13-18, at p. 13.

[142] *See* Part III.B.1(b).

[143] In 2005, a new chapter was added to the Chicago Convention, Annex 9, in order to deal with the increasing problem of inadmissible persons and deportees. These two categories of aliens are addressed separately in "Part B. Inadmissible Persons" and "Part C. Deportees". Persons who are denied admission (inadmissible persons) are subject to a removal order of the State issued to the aircraft operator rather than expulsion and deportation. *See* Chicago Convention, Annex 9, at article 5.5.

of such an alien would therefore appear to constitute non-admission (or *refoulement*) rather than expulsion.[144] This removal of inadmissible passengers has been addressed in a number of treaties, including the Convention on International Civil Aviation,[145] the Schengen Convention,[146] the Migrant

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[144] "Expulsion is traditionally distinguished from return ('refoulement') because return, unlike expulsion, represents a coercive measure denying an individual admission to the territory of the State. However, this does not necessarily imply that the individual would be expelled, and not returned, once he or she has set foot on the territory. The individual may for instance be regarded as returned even when he or she has reached an international airport on the territory of the State taking the measure. Return only implies that the immigrant has been intercepted at or near the border within a short time of immigration and has been forced to go away." Giorgio Gaja, note 28 above, pp. 290-291.

[145] Chicago Convention, Annex 9. "The Convention on International Civil Aviation ('Chicago Convention'), with 188 Member States, has much wider application [than the Schengen Convention]. While the Chicago Convention does not expressly require states to implement carrier sanctions policies, annex 9 to the Convention provides that '[o]perators shall take precautions at the point of embarkation to the end that passengers are in possession of the documents prescribed by the States of transit and destination for control purposes' and that 'Contracting States and operators shall cooperate, where practicable, in establishing the validity and authenticity of passports and visas that are presented by embarking passengers.' If they choose to implement a domestic carrier sanction regime, annex 9 prohibits Member States from imposing such sanctions on carriers who deliver inadmissible passengers unless there is evidence showing the carrier to be negligent in its inspection of documents." David Fisher et al., note 130 above, p. 92 (citing Chicago Convention, Annex 9 (10th ed. 1997), articles 3.14, 3.39, 3.40, 3.4.1), n. 36 ("In fact, Annex 9 appears to recommend a more cooperative approach, urging states as a 'recommended practice' to enter into memoranda of agreement with operators 'setting out guidelines for their mutual support and co-operation in countering the abuses associated with travel document fraud.'") and n. 37 ("In this regard, Annex 9 recommends that states adopt standardized machine-readable passports and 'advance passenger information systems' allowing passenger identification data to be transmitted to the destination state before the flight arrives.") "Persons arriving in state territory by air are generally subject to inspection and admissibility procedures. Under Annex 9 to the (Chicago) Convention on International Civil Aviation, air carriers must 'take precautions at the point of embarkation' to ensure that passengers possess valid travel documents as required by the state of disembarkation. Passengers found to be inadmissible are transferred to the custody of the carrier, who is responsible for their 'prompt removal' to the place where they began their journeys or to any other place where they are admissible. States Parties to the Convention commit themselves to receiving a passenger denied admission elsewhere if he or she had stayed in state territory before embarkation (other than in direct transit), unless the person had earlier been found inadmissible there. Many states impose fines and other penalties on air carriers landing passengers who do not possess proper documents, although penalties are not permitted where the carrier can demonstrate that it has taken 'adequate precautions' to ensure compliance with documentary requirements." Alexander T. Aleinikoff, note 119 above, p. 7 and n. 21 (citing Chicago Convention, Annex 9, at articles 3.52-3.71).

[146] "In 1985, members of the Schengen Convention in Europe agreed to impose such sanctions on their domestic carriers on behalf of other Member States receiving the undocumented persons and to require their carriers to take responsibility for returning any passengers delivered to a State Party without proper documentation. Member States receiving the undocumented persons and to require their carriers to take responsibility for returning any passengers delivered to a State Party without proper documentation. The provisions of the Schengen Convention were later incorporated into the Treaties of the European Union and the European Community and now apply to all members of the European Union except the United Kingdom and Ireland. A 2000 European Council Directive reinforces the Schengen requirements, adding that the required sanctions must be 'dissuasive, effective and proportionate,' with a minimum fine of 3,000 euros per inadmissible passenger." David Fisher et al., note 130 above, pp. 91-92 and nn. 31-33 (citing Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and

Smuggling Protocol and the Trafficking Protocol[147] as well as national law.[148] Thus, the compulsory departure of inadmissible passengers would appear to be outside the scope of the present topic.

76. The compulsory departure of illegal aliens may be achieved by means of a procedure other than expulsion such as non-admission,[149] exclusion[150] or reconduction (*reconduction à la frontière* or

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the French Republic on the Gradual Abolition of Controls at the Common Frontiers, 14 June 1985, article 26, 30 *ILM* 73 ("This agreement was updated in 1990"); Convention Applying the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, 19 June 1990, 30 *ILM* 84; Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Annex B Protocol Integrating the Schengen Acquis into the Framework of the European Union, 2 October 1997, 1997 *Official Journal* (C 340) 1, 37 *ILM* 56 (1998); and Council Directive 2001/5I/EC, article 4, 2002 *Official Journal* (LI87) 45).

[147] "When they enter into force, the Migrant Smuggling Protocol and the Trafficking Protocol will take an approach akin to the Schengen Convention, although their reach (in terms of number of State Parties) will likely be more comparable to the Chicago Convention. Both protocols will require State Parties to 'establish [ ] the obligation of commercial carriers ... to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.'" David Fisher et al., note 130 above, pp. 92-93 and n. 39 (citing Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, No. 39574, *International Legal Materials*, vol. 40, 2001, p. 335 (not yet in force), article 11(3); and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201 (not yet in force), article 11(3).

[148] "Domestic law in a number of states requires common carriers (including, in various combinations, sea, air, and land carriers) servicing their territories internationally to verify travel documents of all boarding passengers. Sanctions are imposed upon carriers that fail to comply." David Fisher et al., note 130 above, p. 91 (citing European Council on Refugees and Exiles, *Carriers' Liability: Country Up-Date on the Application of Carriers' Liability in European States* (1999), www.ecre.org/research/carrier.doc).

[149] "Expulsion differs from non-admission in that in the latter case the alien is prevented from entering the State territory, whereas expulsion regularly concerns individuals whose entry, and in a given case residence, has been initially permitted. Where an alien has entered the territory illegally and without realization of this fact by the national authorities, and afterwards is deported, it may be somewhat doubtful whether this State action constitutes an expulsion or a non-admission. However, the difference is only a question of terminology, because the legal consequence in both cases can be coercive deportation." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 110.

[150] "Expulsion should be distinguished from *exclusion* (*rejection*): expulsion affects aliens who have already established residence or stay in the country, while exclusion takes place at the moment of, or immediately after, attempted entry by aliens into the country. The distinction between expulsion and exclusion is not clearly defined in the legislation of some States where the legal effects of both measures (particularly as regards the interdiction of return to the country) are identical, and sometimes both result from the same administrative procedures. In practically all the States a close link exists between the two measures: expulsion may be utilized to enforce exclusion, and aliens may be expelled without any time limitation on the grounds that they were liable to exclusion at the time of their entry." United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955 (ST/SOA.22 and Corr.2 (replaces Corr.1)), para. 2. "In this opinion 'exclusion' means

droit de renvoi)[151] under the national laws of some States. The nature of these procedures may also vary under the national laws of those States which provide for such procedures. These procedures may apply to aliens who have entered the territory of a State illegally or to those who are detained at the border of a State pending a decision concerning their application for admission. As discussed in the previous section, the notion of the expulsion of aliens is generally limited to aliens who have crossed the border and are physically present in the territory of a State – legally or illegally.

77. There may be important differences between the expulsion of legal aliens and other procedures, such as exclusion, that may be used to ensure the compulsory departure of illegal aliens in terms of the substantive and procedural requirements as well as the destination of the alien.

> "In exclusion proceedings, States generally assume a greater latitude in regard to the destination to which the individual is to be removed, and it is not uncommon to secure his removal to the port of embarkation. The wide choice available to State authorities and accepted in practice must be reviewed against the fact that the excluded alien will only rarely be entitled to appeal against the proposed destination or to arrange for his own departure. Once he has passed the frontier, however, State practice frequently allows him to benefit from certain procedural guarantees. Thus, he may be able to appeal, not only against the expulsion itself, but also against the proposed destination, and he may be given the opportunity of securing entry to another country of his choice. Of course, in the final analysis, if no other State is willing to receive him, then the only State to which the alien can lawfully be removed

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preventing someone from entering the United States who is actually outside of the United States or is treated as being so. 'Expulsion' means forcing someone out of the United States who is actually within the United States or is treated as being so. 'Deportation' means the moving of someone away from the United States, after his exclusion or expulsion." *Kwong Hai Chew v. Colding et al.*, United States, Supreme Court, 9 February 1953, 345 U. S. 229; 97 L.Ed. 972; 73 Sup. Ct. 603, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 343-357, p. 346, n. 1.

[151] "Apart from expulsion (or deportation), French law knows a procedure for summary removal (*'reconduction à la frontière'*). This procedure may be employed only in the case of aliens who are present unlawfully; but even in such cases the intervention of a *tribunal correctionnel* is required." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 463. "The practice of some states may also be distinguished, whereby destitute aliens, foreign vagabonds, suspicious aliens without identity papers, alien criminals who have served their punishment, and the like, are, without any formalities, arrested by the police and reconducted to the frontier. But although such reconduction, often called *droit de renvoi*, is materially not much different from expulsion, it nevertheless differs much from it in form, since expulsion is an order to leave the country, whereas reconduction is forcible conveying away of foreigners." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 940, n. 1. In a study on statelessness prepared by the United Nations Secretariat in 1949, the term "reconduction" was used, instead of "deportation", to designate "the mere physical act of ejecting from the national territory a person who has gained entry or is residing therein irregularly"; United Nations Secretariat, *A Study on Statelessness*, Lake Success – New York, August 1949, doc. E/112, section III, chapter 1(1)(J). "Sometimes too, a distinction is drawn between reconduction of unwanted persons to the frontier and expulsion proper, but it is one without significance either in international law or, generally speaking, in municipal law." D. P. O'Connell, *International Law*, vol. 2, 2nd ed., London, Stevens & Sons, 1970, p. 711.

is his State of nationality or citizenship. If he is unable to secure admission elsewhere, his appeal against removal will commonly fail."[152]

78. In the absence of treaty provisions, the substantive and procedural requirements for the compulsory departure of illegal aliens may vary depending on the national law of the State concerned.[153]

(c) Denial of a residency permit (*refus de séjour*)

79. An alien who has been admitted to and has resided in the territory of a State for a period of time in accordance with its national law may be subject to compulsory departure by means of a procedure involving the withdrawal of or the failure to renew a residency permit. This special procedure which may apply to resident aliens is sometimes referred to as "*refus de séjour*" (or "*refoulement*"). A *refus de séjour* may be applied when the alien: (1) presents a menace to *ordre public*;[154] (2) fails to renew or update a visa or residence permit;[155] or (3) has used false declarations or other fraud to obtain a permit, or has otherwise violated obligatory conditions of stay.[156]

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[152] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 223-224 (citations omitted).

[153] "Refusal of entry will usually involve the return of the alien to the state from which he came. Aliens who have been refused entry to a state, or who have illegally gained entry, may nevertheless have certain rights under the law of that state to challenge any order for their removal, and may also be able to invoke provisions of certain human rights treaties in support of their challenge ..." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 940, n. 2. "The status of the illegal entrant varies from State to State; sometimes he remains susceptible to summary removal, while in other cases he benefits to the full from due process provisions and the right of appeal." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 201 and n. 1 (referring to *R.* v. *Governor of Pentonville Prison ex parte Azam* [1973] 2 All E.R. 765.). "'Exclusion' is a similar process but occurring 'on the threshold'; where an alien has been declared inadmissible upon arrival, his ejection is strictly termed 'exclusion' rather than deportation. For present purposes, however, the distinction between 'deportation' and 'exclusion' is of no moment, although there may be considerable procedural differences between the two (especially with regard to the availability of rights of appeal, review, etc.) in municipal law. Both rest upon the undoubted freedom of States by international law to exercise the sovereign right of excluding aliens from their territory; this right is limited only by principles of international law relating to treatment of aliens and by provisions of any treaties in force between the deporting State and the State of which the alien is a national." Ivan Anthony Shearer, *Extradition in International Law*, Manchester, University Press, 1971, p. 76. (Note: Shearer uses the term "deportation" to refer to the relevant order or decision (expulsion) as well as its enforcement (deportation). He also appears to limit the use of the term "exclusion" to refer to aliens who have not yet crossed the border of the State.)

[154] Cameroon, 2000 Decree, article 65; France, Code, article L511-1(7)-(8).

[155] Madagascar, 1994 Decree, articles 23-26.

[156] Switzerland, 1931 Federal Law, article 9.

80. An alien who is subject to expulsion is usually required to leave the territory of a State within a brief period of time. Such an alien may or may not be given an opportunity to voluntarily leave the territory of the State before being deported. In contrast, an alien who is subject to *"refus de séjour"* is usually given an opportunity to arrange for voluntary departure within a reasonable period of time. States differ as to whether such a procedure constitutes or is equivalent to expulsion.[157] This procedure may be considered to constitute an "intermediate stage" between lawful residence and expulsion.[158] In other words, the alien is no longer entitled to remain in the territory, but he or she is not yet subject to enforcement measures by the State. The alien is given an opportunity to voluntarily comply with the duty to leave the State before being subject to such measures. An alien who fails to leave the territory voluntarily within a specified or reasonable period of time may be compelled to do so.

(d) *Refoulement*

81. The Convention relating to the Status of Refugees[159] refers to both "expulsion" and "return" ("*refoulement*") in article 33. According to the commentary to this provision by Nehemiah Robinson, the introduction of the term "*refoulement*" was inspired by the legal terminology in use in Belgium and France, where the term "expulsion" refers to measures taken on the basis of some criminal

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[157] Tunisia's legislation expressly classifies a *refus de séjour* as an expulsion measure (1968 Law, article 7). The Superior Administrative Court of Münster stated: "According to Article 52 *AuslG* a residence prohibition order is deemed to have the same legal effect as an expulsion order. Thus the plaintiff was prevented from re-entering the territory of the Federal Republic (Article 15 *AuslG*)." *Residence Prohibition Order Case (1)*, Federal Republic of Germany, Superior Administrative Court of Münster, 24 September 1968, *International Law Reports*, volume 61, E. Lauterpacht, C. J. Greenwood (eds.), pp. 431-433. Conversely, the Constitutional Court of Austria, noting the procedural differences in the two procedures under Austrian law, remarked: "Expulsion is a measure of criminal law whereas a prohibition on residence is a measure of control over aliens. The former falls within the competence of the courts whereas the latter is a matter for the administration. The measures serve different purposes." *H v. Directorate for Security of the Province of Lower Austria*, Constitutional Court, 27 June 1975 *International Law Reports*, volume 77, E. Lauterpacht, C. J. Greenwood (eds.), pp. 443-447, at pp. 446-447.

[158] "Both the French and German systems employ the 'refus de séjour' as an intermediate stage between lawful residence and expulsion. The alien whose residence permit is refused or withdrawn comes under a duty to leave with due dispatch, although he is not at that time generally subject to police measures … French law and practice frequently refer to withdrawal and refusal of residence permits as measures of 'refoulement'…" Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 253-254 and 254, n. 1.

[159] Article 33 of this convention deals with the "prohibition of expulsion or return ('refoulement')" and provides as follows:

> "1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
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> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

offense attributable to the individual concerned and the term "*refoulement*" covers more generally measures aimed at ensuring the departure of "undesirable" persons.

> "... there was agreement in the Ad Hoc Committee that '*refoulement*', existing in Belgium and France and unknown elsewhere, means either deportation as a police measure or non-admission at the frontier, because the presence of the particular person in the country is considered undesirable, while 'expulsion' relates mainly to refugees who have committed some criminal offence. In view of the fact that Art. 33 does not deal with admission, it would appear that in most countries there exists only one action, viz., expulsion, while in others (mainly France and Belgium) 'return' would be the equivalent of '*refoulement*'."[160]

82. The term "*refoulement*" is given different meanings in national legislations. The term is often used in relation to refusal of entry, an issue which does not appear to be within the scope of the present topic.[161] However, the term "*refoulement*" is also used in a broader sense to refer to the removal from the territory of the State of illegal aliens or aliens who constitute a threat to *ordre public*, national security, health or morality.[162]

(e) Extradition

83. There are important differences in the nature and purpose of expulsion and extradition even though both procedures may be used by a State to compel the departure of an alien.[163] The expulsion

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[160] Nehemiah Robinson, *Convention Relating to the Status of Refugees. Its History, Contents and Interpretation*, Institute of Jewish Affairs, World Jewish Congress, 1953 (reprinted in 1997 by the Division of International Protection of the United Nations High Commissioner for Refugees), p. 138 (citations omitted).

[161] The legislation of Honduras defines refoulement as a process by which an alien is refused entry and returned to the alien's country of origin or to a willing third State (2003 Act, article 3(23)). Cameroon's legislation specifies that refoulement is a measure taken upon the alien's entry into its territory and involves the immediate escorting of the alien onto a vehicle and into the charge of its operator (2000 Decree, articles 59-60). In Finland's legislation, non-refoulement means to refrain from refusing entry and sending back or deporting the alien (2004 Act, section 147).

[162] Madagascar permits refoulement in cases of illegal entry, stay beyond the expiration of the permitted period or, where the alien has been granted a right of temporary stay, the alien being a menace to *ordre public*, national security, health or morality (1962 Law, articles 12 and 17).

[163] "Theoretically there should be no confusion between extradition and deportation. They are clearly distinct in purpose. The object of extradition is to restore a fugitive criminal to the jurisdiction of a State which has a lawful claim to try or punish him for an offence. To ensure that the fugitive is restored to that jurisdiction is therefore of the very essence of extradition. Deportation, on the other hand, is the means by which a State rids itself of an undesired alien. Its purpose is achieved as soon as the alien has departed from its territory; the ultimate destination of a deportee is of no significance in this respect." Ivan Anthony Shearer, *Extradition in International Law*, Manchester, University Press, 1971, pp. 76-77. "International law distinguishes between expulsion and extradition. Expulsion is an administrative measure in the form of a government order directing an alien to leave the territory; it is often used interchangeably with deportation. Extradition is 'the delivery of an accused or a convicted individual to the state where he is accused of, or has been convicted of a crime, by

of an alien is a unilateral act undertaken by a State to remove an alien whose continuing presence in its territory is contrary to the public interests of the territorial State. In contrast, the extradition of an alien requires the consensual cooperation of two States and is usually undertaken by the territorial State pursuant to a bilateral or other treaty in the interest of the requesting State in order to facilitate the enforcement of its national criminal law.

> "Expulsion as an action to preserve the public security of the State must be distinguished from extradition, since the latter applies to criminal prosecutions, supports the principle of legal assistance between States, and thus suppresses criminality. Extradition is primarily performed in the interest of the requesting State, whereas expulsion is performed in the exclusive interest of the expelling State. Extradition needs the consensual cooperation of at least two States, whereas expulsion is a unilateral action apart from the duty of the receiving State to accept its own national. Therefore, for reasons of either international law or municipal law, the expulsion of an individual may be illegal, whereas the extradition of the same person may be lawful, and vice versa."[164]

84. Extradition would not appear to be within the scope of the present topic, which by its terms is limited to expulsion. Issues relating to extradition may arise in the present context in relation to the question of expulsion as a *de facto* or disguised extradition.[165]

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the state on whose territory he happens for the time to be'." Hélène Lambert, note 83 above, p. 60, n. 130 (citing Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, 940-962). "Another measure which should be distinguished from expulsion is *extradition*: expulsion results from a unilateral decision of the State of residence or stay of the alien, and it is a measure taken in the interest of that State and does not prevent the expelled person, after leaving the territory of the State, from moving freely; extradition results from a bilateral arrangement between two interested States, and it is a measure taken in the interest of the State of enforced destination in cases where the person to be extradited is accused of having committed a criminal offence (other than a political offence or desertion) and consists in handing over that person to the authorities of the State requesting extradition." United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955 (ST/SOA.22 and Corr.2 (replaces Corr.1)), para. 3.

[164] Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 110.

[165] "Like expulsion, extradition implies the removal of a person from the territory of a State. While it has specific features, it may be considered as a subcategory of expulsion to which particular rules apply. However, because of its specific regime, extradition is generally considered a separate legal measure and as such is outside the scope of the present analysis. Extradition generally occurs on the basis of a judicial and/or administrative measure and takes the form of forcible deportation of an individual to another State. Moreover, extradition serves a specific purpose that of bringing a person to trial or making a convicted person serve his or her sentence. Finally, it is necessarily directed towards a specific State, which requested that the person be handed over. When all these features are present with regard to a measure which is nevertheless defined by the State that takes it as expulsion rather than extradition, the measure is considered a 'disguised extradition' and comes to some extent under the special regime pertaining to extradition." Giorgio Gaja, note 28 above, pp. 291-292. *See* Part VII.A.8(a).

(f) Rendition

85. An alien suspected of criminal activity may be transferred to another State by means of a procedure known as "rendition", "extraordinary rendition" or "irregular rendition".

> "The terms 'rendition' and 'extraordinary rendition' have been used to describe a variety of forms of transfer of persons to the custody of other governments... Some of the transfers of persons suspected of terrorist activities occur within a legal framework, such as an immigration deportation process or extradition proceedings. Other transfers are effectuated outside of any legal process. In many ways, these extralegal renditions raise even more serious concerns, largely because they take place in secret and without any procedural safeguards, including an opportunity for the person to challenge the transfer in a legal forum.
>
> "While some have used the term 'rendition' to apply to any transfer to torture, more often 'rendition' is used simply to signify the transfer or sending of a person to another country. 'Extraordinary rendition' typically refers to the extralegal form of the practice, in which a person is apprehended in one country and handed over to another without any formal legal procedure. Some differentiate extraordinary renditions from renditions not based on the process used to effectuate the transfer, but on whether the end result involves risk of torture. They use the term 'extraordinary rendition' to signify the transfer of terror suspects to countries where they may face torture."[166]

86. This relatively rare phenomenon has been used with increasing frequency in recent years in relation to aliens suspected of involvement in international terrorist activities.

> "Persons suspected of terrorist or criminal activity may be transferred from one State (i.e., country) … to another to answer charges against them. The surrender of a fugitive from one State to another is generally referred to as *rendition*. A distinct form of rendition is *extradition,* by which one State surrenders a person within its territorial jurisdiction to a requesting State via a formal legal process, typically established by treaty between the countries. However, renditions may be effectuated in the absence of extradition treaties, as well. The terms 'irregular rendition' and 'extraordinary rendition' have been used to refer to the *extrajudicial* transfer of a person from one State to another, generally for the purpose of arrest, detention, and/or interrogation by the receiving State … Unlike in extradition cases, persons subject to this type of rendition typically have no access to the judicial system of the sending State by which they may challenge their transfer. Sometimes persons are rendered from the territory of the rendering State itself, while other times they are seized by the rendering State in another country and immediately rendered, without ever setting foot in the

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[166] Human Rights Watch, Report to the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Report submitted by Wendy Patten), 7 June 2005, p. 2 (citations omitted).

> territory of the rendering State. Sometimes renditions occur with the formal consent of the State where the fugitive is located; other times, they do not."[167]

87. The seizure and rendition of aliens by a State from the territory of another State would not be within the scope of the present topic, which is concerned with the expulsion of aliens by a State from its own territory. In addition, the rendition of aliens by a State from its own territory would not be within the scope of the present topic, which deals with the removal of aliens by a State because their presence is contrary to its own interests rather than to facilitate the arrest, detention, or interrogation of a person in another State.

(g) Forcible transfer or internal displacement

88. The notion of expulsion includes the compulsory departure of an alien *from* the territory of a State. The forcible transfer of aliens by a State *within* its territory (also known as "internal displacement") is not within the scope of the present topic.[168] This distinction was repeatedly stressed, in the context of international criminal law, by the International Tribunal for the Former Yugoslavia in several decisions and judgments.[169]

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[167] Michael John Garcia, "Renditions: Constraints Imposed by Laws on Torture", USA Congressional Research Service Reports for Congress on General National Security Topics, The Library of Congress, RL32890, 5 July 2005, pp. 1-24, at pp. 1-2 (citations omitted). "Although the particularities regarding the usage of extraordinary renditions and the legal authority behind such renditions is not publicly available, various U.S. officials have acknowledged the practice's existence. Recently, there has been some controversy as to the usage of renditions by the United States, particularly with regard to the alleged transfer of suspected terrorists to countries known to employ harsh interrogation techniques that may rise to the level of torture, purportedly with the knowledge or acquiescence of the United States." Ibid., at p. i. In a recent United Kingdom case involving expulsion, the House of Lords ruled that evidence which had, or might have been obtained under torture was inadmissible in any proceedings. *See A. and Others v. Secretary of State for the Home Department*, House of Lords, [2005] UKHL 71, All ER (D) 124 (Dec), 8 December 2005.

[168] "Questions of forced resettlement concern involuntary displacements within the jurisdiction of a State and not transfrontier movements." Alfred-Maurice De Zayas, "Population, Expulsion and Transfer", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science, vol. 3, 1997, pp. 1062-1068, at p. 1062. "The issue of 'internally displaced persons' is not discussed in this study, as they do not cross international borders, but in recent years they have started receiving considerable international assistance and some measure of protection." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 100.

[169] *See*, in relation to crimes against humanity, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement of 2 August 2001, p. 183, para. 521: "Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State." The same approach was followed by the Tribunal in *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement of 15 March 2002, pp. 198-199, para. 474; *Prosecutor v. Mladen Naletilić, aka "TUTA" and Vinko Martinović, aka "ŠTELA"*, Case No. IT-98-34-T, Judgement of 31 March 2003s, p. 228, para. 670; *Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić* Case No. IT-95-9-T, Judgement of 17 October 2003, pp. 41-42, para. 122; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T,

(h) Expulsion *stricto sensu* or functional approach

89. The question arises as to whether the scope of the present topic should be limited to action taken by a State to compel the departure of an alien which constitutes expulsion strictly speaking or be extended to include other procedures which perform the same function (e.g., constructive expulsion, exclusion, non-admission, reconduction and *refus de séjour*). The narrower approach to the topic focusing exclusively on expulsion would presumably be less complicated and more expeditious. However, this approach would not provide a comprehensive regime for the regulation of the various types of procedures which may apply to specific categories of aliens such as illegal aliens or resident aliens. The broader approach to the topic would provide a more comprehensive system for the regulation of the various procedures that may be used by a State to ensure the compulsory departure of aliens from its territory.[170] Thus, the present question is related to some extent to the previous question of whether the present topic should extend to specific categories of aliens. It should further be noted that the broader approach may require greater consideration of the general principles that emerge from the relevant practice of States whose laws provide for the various procedures. In some instances, different terms may be used in the national laws of different States to refer to procedures which are intended to perform the same function. A functional approach may facilitate the identification of the general characteristics that are common to the various procedures found in different legal systems.

90. In contrast, the scope of the topic would not extend to procedures which are intended to perform a function other than the expulsion of an alien by a State from its territory when the presence of such an alien is contrary to the interests of that State. First, national immigration law and procedures which regulate the admission of aliens who have not yet been formally admitted to the territory of the State and are not otherwise considered to be physically present in the State would be outside the scope of the present topic.[171] Secondly, extradition procedures undertaken to compel the

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Decision on Motion for Judgement of Acquittal, 16 June 2004, pp. 19-25, para. 45-69; *Prosecutor v. Radoslav Brđjanin*, Case No. IT-99-36-T, Judgement of 1 September 2004, pp. 202-204, paras. 540-544, and *Prosecutor v. Vidoje Blagojević, Dragan Jokić*, Case No. IT-02-60-T, Judgement of 17 January 2005, pp. 221-222, para. 595. In contrast, *see Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement of 31 July 2003, para. 679, p. 193, where the displacement of persons across national borders was not considered as a necessary element of the crime of deportation ("The crime of deportation in this context is therefore to be defined as the forced displacement of persons by expulsion or other coercive acts for reasons not permitted under international law from an area in which they are lawfully present to an area under the control of another party.")

[170] The Human Rights Committee appears to have adopted a functional approach to the application of article 13 of the International Covenant on Civil and Political Rights concerning the expulsion of aliens as follows: "ICCPR Art. 13 applies to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise." Human Rights Committee (International Covenant on Civil and Political Rights), General Comment No. 15: The Position of Aliens under the Covenant, 11 April 1986. *See* Kate Jastram, "Family Unity" *in* Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 185-201, at p. 191, n. 32.

[171] "Expulsion of an alien after being lawfully admitted into a state is to be distinguished from the refusal to allow an alien to enter the state, expulsion or deportation in the two situations often being subject to different

departure of an alien at the request of another State to facilitate the enforcement of its national criminal law would be outside the scope of the present topic. Thirdly, the rendition of an alien by a State to another State for purposes of arrest, detention, interrogation or prosecution would be outside the scope of the present topic. Fourthly, the forcible transfer or internal displacement of aliens within a State would also be outside the scope of the present topic.

2. Deportation

91. A distinction may be drawn between the notion of expulsion as referring to the formal decision or order requiring the departure of an alien, on the one hand, and the notion of deportation as referring to the enforcement of the decision or order, on the other.[172]

> "Expulsion refers to the order of a State government advising an individual – in general, a foreign national or a stateless person – to leave the territory of that State within a fixed and usually short period of time. This order is generally combined with the announcement that it will be enforced, if necessary, by deportation. In short, expulsion means the prohibition to remain inside the territory of the ordering State; deportation is the factual execution of the expulsion order. ... The execution of expulsion normally entails deportation, i.e. the coercive transportation of the alien out of the territory of the expelling State, if the alien refuses to leave voluntarily."[173]

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legal requirements, usually in the sense of allowing more easily the removal of those refused entry." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 940, n. 2 (referring to *Barber v Gonzales,* ILR, 20 (1953), p. 276; *Roggenbihl v Lusby,* ibid., p. 281; *The State v Ibrahim Adam,* ILR, 23 (1956), p. 374; *Leng May Ma v Barber,* ILR, 26 (1958-II), p. 475; *R v Pringle, ex parte Mills* (1968), ILR, 44, p. 135). "The power of expulsion or deportation may be exercised when an alien seeks to enter a country or after the alien has entered the territory of a State. However, where the alien in seeking to enter a country does not succeed, he or she is not technically expelled or deported but is excluded. [See Governing Rule 9.]" Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 90.

[172] "Normally expulsion finds its origin in an administrative or judicial measure enjoining the individual to leave the territory within a given period of time under penalty of being forcibly turned out. In some cases, the measure is directly enforced without giving the individual an opportunity of leaving on his or her own. Whenever force is used by the State in order to make sure that the individual actually leaves the territory the measure is usually called deportation. However, this term is also used to signify a forcible move from one part of the territory of a State to another. For instance, deportation would appropriately describe the past practice of sending convicts and unwanted aliens from mainland France to colonies like the Cayenne." Giorgio Gaja, note 28 above, p. 289.

[173] Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at pp. 109 and 111.

92. There are different views as to whether such a distinction is necessary.[174] The national laws of States differ in this regard.[175] The distinction may be useful in delineating the two phases relating to the expulsion of an alien which may require consideration of different substantive and procedural issues. It may also be useful to adopt a functional approach to the notion of deportation since the national laws of States use different terms to refer to the enforcement aspect of the compulsory departure of an alien in general and in relation to different categories of aliens. It should also be noted that the term "deportation" may have a different meaning depending on whether it is used in English or French legislation.[176]

D. Expulsion of aliens in time of armed conflict

93. The fourth issue to consider in determining the scope of the present topic is the extent to which there are special rules that govern the expulsion of aliens in time of armed conflict.

> "Theory and practice correctly make a distinction between expulsion in time of hostilities and in time of peace. A belligerent may consider it convenient to expel all hostile nationals residing, or temporarily staying, within its territory: although such a measure may be very hard on individual aliens, it is generally accepted that such expulsion is justifiable."[177]

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[174] "Sometimes a distinction is drawn between deportation and expulsion, but it is one to which international law is indifferent. Deportation is the act of removal of persons whose initial entry is illegal, whereas expulsion is the termination of the legal entry and right to remain." D. P. O'Connell, *International Law*, vol. 2, 2nd ed., London, Stevens & Sons, 1970, p. 711. "'Deportation' is not a term of art and is used synonymously with 'expulsion'; it is the compulsory ejection of an alien from the territory of the deporting State, normally accompanied by threats of exclusion should the alien attempt re-entry." Ivan Anthony Shearer, *Extradition in International Law*, Manchester, University Press, 1971, p. 76 (citation omitted).

[175] "Municipal laws show little consistency, but a distinction is sometimes drawn between expulsion and deportation, the latter being confined to proceedings initiated at the port of entry and designed to effect departure after refusal of admission. In the United States, 'deportation statutes' were first passed to facilitate the removal of illegal immigrants, but it will be seen that over the years deportation has developed its own peculiar regime." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 201 (citation omitted).

[176] "The expression 'deportation' is used in the legislation of English-speaking countries; it has an entirely different meaning in French-speaking countries, where it denotes the punishment of a criminal (who may be either a national or an alien) by removal to a penal settlement outside the metropolitan territory of the country. The term 'expulsion' is used throughout the English version of this study, except in quotations from legislative texts which use the term 'deportation'." United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955 (ST/SOA.22 and Corr.2 (replaces Corr.1)), para. 1, n. 1.

[177] Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 941. "Only issues concerning individual expulsion in time of peace will be considered here." Giorgio Gaja, note 28 above, p. 289. "This monograph only deals with some basic, across-the-board principles and rules, to which other rules and regulations should conform … In principle, the rules discussed in this monograph apply only in time of peace; they do not apply in time of war or internal armed conflict." Louis B. Sohn and T.

94. International humanitarian law addresses various situations involving the departure or transfer of civilians, including aliens, in relation to an armed conflict. However, international humanitarian treaty law does not appear to explicitly govern the expulsion of an alien by a State from its territory in time of international or non-international armed conflict.

> "It is curious that the customary right of a State to expel all enemy aliens at the onset of a conflict has not been abrogated by the Convention. It has been suggested that if a State does so expel enemy aliens it ought at least to allow them the same facilities for departure, in the way of money and possessions, as in the case of those allowed to depart under Article 35 … Humanitarian considerations and logic may demand this, but no such provision is to be found in the Convention and neither is such expulsion condemned by customary international law … This seems a serious lacuna for States are thus left free to expel on such terms as they like, *e.g.*, aliens may be expelled at short notice with neither money nor possessions ..."[178]

95. The Fourth Geneva Convention contains provisions governing the treatment of civilians (protected persons)[179] in time of international armed conflict. This Convention addresses the *voluntary* departure of aliens who find themselves in the territory of a State which is a party to the conflict under article 35.[180] This provision does not address the compulsory departure or the expulsion of aliens by a

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Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. viii.

[178] Gerald Draper, The Red Cross Conventions pp. 36-37 (1958), *quoted in* 10 Digest of International Law p. 274 (Marjorie Whiteman ed., 1968).

[179] Article 4, para. 1, of the Fourth Geneva Convention defines the notion of "protected person" as follows:

> "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> "Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. The provisions of Part II are, however, wider in application, as defined in Article 13.
>
> "Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention."

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, United Nations, *Treaty Series*, vol. 75, No. 973, p. 287 [hereinafter, Fourth Geneva Convention].

[180] Fourth Geneva Convention, article 35:

> "All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves

State from its territory during such a conflict. The commentary to the Fourth Geneva Convention prepared by the International Committee of the Red Cross (ICRC) clearly indicates that article 35 is concerned only with the voluntary departure of aliens[181] and that the right of a State to expel an alien from its territory is retained notwithstanding the prohibition of forced repatriation.[182] The Eritrea-Ethiopia Boundary Commission reached a similar conclusion with respect to the explicit application of the Convention.[183]

96. The Fourth Geneva Convention addresses the *compulsory* departure of aliens from the territory of a State as a result of transfer, repatriation or extradition under article 45.[184] However, this

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with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use.

"If any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.

"Upon request, representatives of the Protecting Power shall, unless reasons of security prevent it, or the persons concerned object, be furnished with the reasons for refusal of any request for permission to leave the territory and be given, as expeditiously as possible, the names of all persons who have been denied permission to leave."

[181] "The words 'who may desire to leave the territory' show quite clearly that the departure of the protected persons concerned will take place only if they wish to leave. The International Committee's original draft laid down that no protected person could be repatriated against his will; the same idea is implicit in the text actually adopted, although it is expressed somewhat differently. The point is an important one, for many foreign civilians do no wish to leave a country where they have lived for many years and to which they are attached." Jean S. Pictet (ed.), *Commentary. IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva, International Committee of the Red Cross, 1958, p. 235 (Citations omitted.)

[182] "While forced repatriation – that is, sending a person back to his country against his will – is prohibited, the right of expulsion has been retained." Ibid., p. 235, n. 1.

[183] "Geneva Convention IV does not explicitly address expulsion of nationals of the enemy state or other aliens, instead emphasizing the right of aliens who wish to leave the territory of a belligerent to do so. *See* Art. 35." *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, para. 81, n. 27.

[184] Fourth Geneva Convention, article 45:

"Protected persons shall not be transferred to a Power which is not a party to the Convention. This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.

"Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.

provision does not deal with the compulsory departure of aliens by means of expulsion.[185] The commentary to article 45 clearly indicates that the right of a State to expel individual aliens from its territory for reasons relating to national security is retained:

> "[T]here is no provision concerning deportation (in French expulsion), the measure taken by a State to remove an undesirable foreigner from its territory. In the absence of any clause stating that deportation is to be regarded as a form of transfer, this Article would not appear to raise any obstacle to the right of Parties to the conflict to deport aliens in individual cases when State security demands such action."[186]

97. The Fourth Geneva Convention further addresses the compulsory departure of civilians by means of "forcible transfer" or "deportation" by an occupying power from an occupied territory to the territory of the occupying State or another State under article 49.[187] This provision applies to the forcible transfer or deportation of persons who are not nationals of the occupying State. These persons may or may not be nationals of the State in whose territory they are present. However, the forcible transfer or deportation of persons by an occupying State, even those who are not nationals of the State in which they are present, would not constitute the expulsion of an alien *by a State from its territory*.

"In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

"The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law."

[185] "The Commentary to the Fourth Geneva Convention clearly explains the standards set by modern international humanitarian law. It explains that Article 45 of the Fourth Geneva Convention deals with transfers of civilians including internment in the territory of another state, repatriation, the returning of protected persons to their country of residence or their extradition. The Fourth Geneva Convention makes provision for all these possibilities. On the other hand there is no provision concerning expulsion, the measure taken by a State to remove an undesirable foreigner from its territory. In the absence of any clause stating that deportation is to be regarded as a form of transfer, Article 45 would not appear to raise any obstacle to the right of states to the conflict to expel aliens in individual cases when state security demands such action." Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice*, The Hague, Martinus Nijhoff Publishers, 1995, p. 137.

[186] Jean S. Pictet (ed.), note 182 above, p. 266.

[187] Jennings and Watts make the following observations in their consideration of the expulsion of aliens: "Different issues are raised by the deportation of civilians from territories under a state's belligerent occupation ... The matter has received particular attention in relation to the deportation of Palestinians from territories occupied by Israel on the West Bank of the River Jordan and the Gaza Strip from 1967 onwards: see e.g. SC Res 607 and 608 (1988), and Tabari, Harv ILJ, 29 (1988), pp 552-8." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 941, n. 4.

This provision does not govern the expulsion of an alien by the territorial State in time of international armed conflict.[188]

98. Moreover, the unlawful deportations or transfers which are characterized as grave breaches under article 147 of the Fourth Geneva Convention may be understood as referring to the limited situations mentioned above, namely those addressed in articles 45 and 49 of the Fourth Geneva Convention.[189] The same may be said with respect to the forcible transfers and deportations defined as war crimes in the Statute of the International Criminal Tribunal for the Former Yugoslavia[190] and in the Rome Statute of the International Court.[191]

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[188] Article 49 of the Fourth Geneva Convention provides as follows:

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> "Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
>
> "The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.
>
> "The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.
>
> "The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.
>
> "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

[189] Article 147 of the Fourth Geneva Convention provides as follows:

> "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, *unlawful deportation or transfer or unlawful confinement of a protected person*, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." [Emphasis added.]

[190] Statute of the International Tribunal for the Former Yugoslavia, contained in Security Council resolution 827 (1993), 25 May 1993. Article 2 provides as follows: "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: […] (g) unlawful deportation or transfer or unlawful confinement of a civilian".

[191] Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3. Article 8 provides as follows:

99. In addition, article 85 of Additional Protocol I to the Geneva Conventions characterizes as "grave breaches" only deportations or transfers occurring within the context of occupied territories.[192] Thus, international humanitarian treaty law would not appear to explicitly govern the expulsion of aliens by a State in time of international armed conflict. Moreover, a study on customary international humanitarian law published by the International Committee of the Red Cross almost fifty years after the adoption of the Fourth Geneva Convention only addresses the issues of "forcible transfer" and "deportation" with respect to actions by an occupying power in an occupied territory.[193]

100. Additional Protocol II to the Geneva Conventions contains provisions governing the treatment of civilians in time of non-international armed conflict. Protocol II prohibits the compulsory departure of civilians from their own territory for reasons connected to the conflict under article 17, paragraph 2.[194] However, this provision does not address the compulsory departure of aliens by means of

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> "1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
>
> 2. For the purpose of this Statute, "war crimes" means:
>
> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: […] (vii) Unlawful deportation or transfer or unlawful confinement; [...]
>
> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: […] (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory."

[192] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3, article 85(4):

> "[...] the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions of the Protocol; (a) The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention".

[193] *See* Rule 129 A of the ICRC's study on customary international humanitarian law: "Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand." Jean-Marie Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I – Rules, Cambridge, University Press, 2005, p. 457.

[194] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977, United Nations, *Treaty Series*, vol. 1125, No. 17513, p. 609, article 17 – Prohibition of forced movement of civilians:

> "1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
>
> 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."

expulsion. As indicated in the commentary to article 17 of Protocol II prepared by the ICRC, "… national legislation concerning aliens is not affected by this provision".[195]

101. The Eritrea-Ethiopia Claims Commission addressed the question of the applicable law governing the expulsion of aliens in time of armed conflict. The Commission recognized the broad power of a belligerent to expel nationals of the enemy State from its territory during a conflict. At the same time, the Commission also recognized that such expulsions must be carried out in accordance with international humanitarian law concerning the treatment of protected persons.

102. In its partial award with respect to Eritrea's civilian claims, the Commission stated as follows:

> "International humanitarian law gives belligerents broad powers to expel nationals of the enemy State from their territory during a conflict. … The Commission concluded above that Ethiopia lawfully deprived a substantial number of dual nationals of their Ethiopian nationality following identification through Ethiopia's security committee process. Ethiopia could lawfully expel these persons as nationals of an enemy belligerent, although it was bound to ensure them the protections required by Geneva Convention IV and other applicable international humanitarian law. Eritrea's claim that this group was unlawfully expelled is rejected."[196]

103. In its partial award with respect to Ethiopia's civilian claims, the Commission similarly stated as follows:

> "Neither Party specifically addressed the scope of the powers of belligerents under international humanitarian law to expel the nationals of enemy States during an international armed conflict. […] Eritrea denied that any Ethiopians were expelled during this period pursuant to official actions or policies, contending that departures reflected free choices by those who left. For its part, Ethiopia emphasized the rules relating to expulsions of aliens in peacetime. […]
>
> "In its separate Partial Award on Eritrea's Civilians Claims, the Commission addresses the right of a belligerent under the *jus in bello* to expel the nationals of an enemy State during an international armed conflict. … However, the conditions of all such expulsions must meet minimum humanitarian standards, as set forth in Articles 35 and 36 of Geneva Convention IV."[197]

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[195] Yves Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, International Committee of the Red Cross, Martinus Nijhoff Publishers, 1987, p. 1474, para. 4868 (citation omitted).

[196] *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 81-82.

[197] *Partial Award, Civilians Claims, Ethiopia's Claim 5*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 119 and n. 35 (text of note inserted in the quoted paragraph after the ellipsis) and 121-122.

104. The consideration of the awards of the Eritrea-Ethiopia Claims Commission for present purposes is limited to the question of the applicable law governing the expulsion of aliens in time of armed conflict. The Commission's awards relating to the lawfulness of the expulsion of aliens in time of armed conflict are addressed in Part X.H.

105. It follows from the foregoing that there may be rules of international law applicable in time of armed conflict which are relevant to the determination of the lawfulness of the expulsion of aliens in such a situation. In addition, as recognized by the Eritrea-Ethiopia Claims Commission, general principles of international humanitarian law may apply to the expulsion and deportation of enemy aliens.[198] However, these rules and principles may not address all aspects of the substantive and procedural requirements for the expulsion of aliens in time of armed conflict. Thus, the expulsion of an alien – even in time of armed conflict – may still be subject to substantive and procedural limitations under the rules of international law relating to the expulsion of aliens, such as human rights limitations. The International Court of Justice has recognized that: "[T]he protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights."[199]

106. Thus, the Commission may need to consider the extent to which the expulsion of aliens in time of armed conflict should be addressed within the scope of the present topic. The broader approach to the topic would presumably be more complicated and time-consuming since it would require consideration of the relevant rules of international law relating to armed conflict. This approach would provide a more comprehensive regulation of the expulsion of aliens in a particular situation which is of practical importance in view of the frequency with which it occurs. The narrower approach to the topic would presumably be less complicated and more expeditious by focusing on the rules governing the expulsion of aliens in time of peace.

E. Collective expulsion and mass expulsion

107. The fifth issue to consider in determining the scope of the present topic is whether it should be limited to the expulsion of individual aliens or be extended to include the collective expulsion of a group of aliens *as such* and the mass expulsion of a large number of aliens. The narrower approach to the topic would be more expeditious and less complicated by focusing on the distinct legal regime which governs the expulsion of individual aliens. The broader approach to the topic would provide a more comprehensive regime for the expulsion of aliens but may require separate consideration of the expulsion of aliens under what may be viewed as three different legal regimes governing individual expulsion, collective expulsion and mass expulsion. The issues and relevant materials relating to collective expulsion and mass expulsion are briefly addressed for purposes of facilitating a decision on this aspect of the scope of the topic in Part XII.

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[198] *See* Part X.H.

[199] Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion), I.C.J. Rep. 2004, at advisory opinion p. 41 (para. 106).

F. Treaty law

108. The expulsion of an alien by a State must be in accordance with any relevant treaty obligation binding on that State.[200] There are numerous treaties which may affect the extent to which and the manner in which a State Party may expel an alien who is a national of another State party to a relevant treaty.[201]

> "The competence of a State to regulate and control the movement of persons across its borders is also limited by its treaty obligations, the treaties being of a bilateral or multilateral nature. States have concluded hundreds of international agreements concerning the movement of persons across their borders. In doing so, matters which had originally been within their exclusive competence have become regulated by provisions of these treaties. The discretion of States is thereby limited, as they are obliged to act in accordance with the provisions of the agreements to which they are parties. Generally, the object of these treaties is the liberalization and facilitation of movement of persons across borders, and some of them even provide for complete freedom of such movement. The acceptance by States of these limitations on their competence is, however, usually accompanied by escape clauses allowing a State to use

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[200] "The power of expulsion is a sovereign right, in that it pertains to every State for that State's protection, but it is a power which is controlled and limited, particularly by treaty obligations..." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 310. "the right to expel or deport… must be exercised in conformity with… the applicable international agreements, global, regional and bilateral." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 89. "Arbitrary expulsions… in violation of… a treaty… have given rise to diplomatic claims and to awards by arbitral commissions." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1915, p. 57. "A claimant alleging expulsion has the burden of proving the wrongfulness of the expelling State's action, in other words that it was… in breach of the expelling State's treaty obligations." *Rankin v. The Islamic Republic of Iran,* note 136 above, p. 142, para. 22.

[201] "There are numerous instances of treaty arrangements between States or by groupings of States which relate to or bear upon the rights of their nationals in the matter of entry, movement or residence in the territories of the States concerned. Where such arrangements exist, the rights of persons who are nationals of the contracting State parties to a treaty will be governed by the provisions of the relevant treaty …" Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 50. *See Ex parte Duke of Chateau Thierry* [1917] 1 KB 922 ("deportation under a convention for the mutual deportation of persons liable to military service"); Agreement of 29 July 1933, between the UK Government, the Government of India, and the French Government regarding deportations from certain eastern British and French territories and Protocol I, II and III, League of Nations, *Treaty Series*, vol. CXLII, p. 166; Pan-American Convention on the Status of Aliens of 20 February 1928, article 6, (Hudson, *Legislation,* vol. iv, p. 2377); Treaty concluded between Denmark, Finland, Iceland, Norway and Sweden on the Conveyance in Transit of Deported Persons, 1965, United Nations, *Treaty Series*, vol. 572, p. 175. (Per Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 941, n. 6.)

> extraordinary measures to protect some vital interests which are of special concern to the States parties to these treaties."[202]

109. Since the mid-seventeenth century, States have concluded a large number of bilateral treaties governing the movement, treatment and status of their nationals, including treaties of friendship, treaties of friendship and commerce, treaties of commerce and navigation, treaties of commerce and establishment and consular treaties.[203]

> "As their name implies, treaties of commerce and establishment operate to make easier the entry, residence, and business activities of nationals in the territories of the States parties. The word 'establishment' is not confined to entry alone, but is a term of art applicable to all the provisions of a commercial treaty which affect the activities of aliens. The treaty itself will commonly attempt to lay down standards of treatment whose general object is non-discrimination with regard to treaty nationals and companies, and these standards may be expressed in terms of most-favoured-nation treatment, national treatment, or treatment in accordance with the international law standard. As a general rule, treaty provisions of this nature are not to be so construed as to affect existing laws on entry and residence, or the power to enact future regulations. In addition the rights prescribed are limited by reference to the aims of such treaties, namely, the encouragement of bilateral trade and investment. There is,

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[202] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 7-8.

[203] "The main examples of treaty practice in the matter of movement of persons can be found in the large body of bilateral agreements concluded under differing titles such as 'Treaty of Friendship,' 'Treaty of Friendship and Commerce,' 'Treaty of Commerce and Navigation,' or 'Consular Treaty.' Such treaties have been concluded ever since the middle of the 17th century, between both the major powers of the day and between the major powers and smaller nations, to regulate the movement, status and treatment of their nationals. The number of such friendship treaties has increased a great deal during the present century and especially since the Second World War. These treaties quite often use a standard terminology concerning the treatment to be accorded to the nationals of State Parties, such as 'most favored nation treatment' or 'national standard of treatment.' At times such treaties also spell out the rights of nationals to entry, residence or establishment in specific terms or adopt more restrictive phraseology." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington, D.C., American Society of International Law, 1992, p. 51. "Provisions concerning expulsion have been included in a number of bilateral instruments, mainly treaties on residence, amity, commerce and navigation, etc. Some are limited to a recognition of the right of either contracting State to expel, or otherwise remove, nationals of the other who are considered undesirable – who have, for example, violated regulations on residence of aliens, or accepted employment without authorization. Many instruments recognize the right of expulsion by establishing an exception to the principle of equality of treatment of nationals of the other State with nationals of the State of their residence. Other provisions assure the readmission of expelled persons by their States of origin. Some instruments restrict the right of expulsion to cases of particular seriousness and stipulate that the States of origin of persons to be expelled should receive early notice concerning the reasons and circumstances. It should be observed, however, that provisions restricting the right of expulsion, although sometimes applied to other countries on the basis of a most-favoured-nation clause, are rarely found in instruments binding the leading emigration and immigration countries." United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955 (ST/SOA.22 and Corr.2 (replaces Corr.1)), para. 107 (citations omitted).

therefore, an underlying assumption that the power of expulsion is retained, although the aims and purposes of the treaty in question indicate the confines of State discretion. The power of expulsion cannot be used in such a way as to frustrate those aims and purposes, and it is in this light that one should view the reservation common to treaties of establishment, which permits either party to apply measures necessary to maintain public order. The fact that the treaty alien remains liable to expulsion is frequently balanced by provisions which guarantee to him national and most-favoured-nation treatment regarding access to the courts, and protection and freedom from unlawful molestation in no case less than that required by international law. Today, the rights of access to the courts and to the equal application of justice are firmly established in general international law, whereas, in an earlier period, they resulted most frequently from the provisions of bilateral treaties. These general principles are strengthened by the rule that a State may not adduce deficiencies in its own law with a view to avoiding its obligations, either generally, under customary international law, or specifically, under treaty.[204]

110. In the nineteenth and early twentieth centuries, bilateral treaties provided the basis for claims of unlawful expulsion in disregard of the rights guaranteed to aliens who were nationals of a State party.[205] These early developments with respect to the rights of such aliens who were subject to expulsion have contributed to the recognition of substantive and procedural requirements for the expulsion of aliens in general. The relevant treaty rules and standards relating to the expulsion of aliens may reflect general international law to some extent.[206]

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[204] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 292-293 (citations omitted).

[205] National courts, in examining such claims, have generally been reticent to interpret such treaties as affecting the right to expel. *See, e.g., Hearn v. Consejo de Gobierno,* Court of Cassation of Costa Rica, 17 September 1962, *International Law Reports*, volume 32, E. Lauterpacht (ed.), pp. 257-260, at p. 259: "Nor does it [The Convention on the Status of Aliens, signed at the Sixth International American Conference in the City of Havana, Cuba, in the year 1928] contradict the provisions on expulsion of aliens, since the right not to expel a person, even when undesirable, or to condition such expulsion, as defined in Article 2 of said Law of 1894, is a sovereign right of each State"; *Pieters v. Belgian State (Minister of Justice)*, Conseil d'État, 30 September 1953, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 338-339, at p. 338: "That Treaty provided, on the one hand, for 'national' treatment in the matter of taxes, and, on the other, for expulsion only in three cases, namely, of persons dangerous to public morality, to public health, and to the public safety. ... However, by virtue of clause 1 of Article 1, paragraph 1, of that Treaty, the nationals of the High Contracting Parties enjoy the benefits thereof only on condition that they comply with the local law and regulations"; *Perregaux,* Conseil d'État, 13 May 1977, *International Law Reports*, volume 74, E. Lauterpacht, C.J. Greenwood (eds.), pp. 427-430. *See, contra, In re Watemberg,* Council of State, 13 December 1937, *Annual Digest and Reports of Public International Law Cases*, 1938-1940, H. Lauterpacht (ed.), Case No. 137, pp. 384-386.

[206] "The rules and standards proposed receive additional support from the provisions of treaties. These do not only reflect the controls on discretion which are imposed by general international law, but seek also to define these controls with greater precision in the light of the express aims and purposes of the particular treaty." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 309.

> "The alleged infringement of treaty rights has given rise to various diplomatic claims for expulsion. Thus, numerous awards were made by the domestic commission of March 3, 1849 dealing with claims against Mexico, on proof that the claimants were expelled from Mexico during the period of the Mexican war in violation of the stipulation of art. 26 of the treaty of April 5, 1831, that in case of war 'there shall be allowed the term of six months to the merchants residing on the coast, and one year to those residing in the interior ... to arrange their business, dispose of their effects,' etc. Where they had done nothing to forfeit their immunity from expulsion, their compulsory removal before the expiration of the six months or the year, respectively, was plainly a violation of the treaty. A stipulation in a treaty to the effect that citizens of the United States shall have the right to reside and do business, or are under the protection of the laws, has reinforced the arguments of secretaries of State in protesting against the arbitrary and summary expulsion of American citizens without notification of the charges and an opportunity to refute them and without form of hearing or trial."[207]

111. These bilateral treaties may contain provisions in which the States parties explicitly reserve the right to expel aliens.[208] However, the surrender of the right of expulsion is not implicit in the adoption of such treaties even in the absence of an explicit provision reserving the right to expel aliens.[209]

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[207] Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 58 (referring to cases reported in Moore's Arb. 3334 *et seq*).

[208] "The right of expulsion is sometimes expressly reserved in treaties." Ibid., p. 49, n. 2 (referring to Treaty between U. S. and Spain, July 3, 1902, article 2, Malloy, II, 1702). "Article 1 of the 1937 Treaty of Establishment between Egypt and Turkey [7 April 1937, League of Nations, *Treaty Series*, vol. 191, p. 95] provides: 'Nationals of either High Contracting Party may, subject to compliance with the laws and regulations of the country, enter freely, travel, reside and establish themselves in the territory of the other Party, except in prohibited localities or zones, or may leave it at any time, without being subject to restrictions of any kind other than those to which nationals of that country are or may hereafter be subject. Each of the High Contracting Parties reserves the right to prohibit, under the order of the court, or in accordance with the laws and regulations relating to public morality, public health or pauperism, or for reasons affecting the external or internal safety of the State, individual nationals of the other Party from residing or establishing themselves in its territory and to expel them for such reasons.' Many other agreements contain similar clauses." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington, D.C., American Society of International Law, 1992, p. 10.

[209] "Nor is the right of expulsion limited by treaties which guarantee to the citizens of the contracting parties the right of residence and travel, or of trade, and other rights." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1915, p. 49. "The right of a state to expel, at will, aliens, whose presence is regarded as undesirable, is, like the right to refuse admission of aliens, considered as an attribute of the sovereignty of the state, and is not limited even by treaties which guarantee the right of residence to the nationals of other contracting states (*Fong Yue Ting* v. *U.S.*, 149, U.S. 698 (1892))." Shigeru Oda, "Legal Status of Aliens", *in* Sørensen, Max (dir.) *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, at p. 482. "Treaties of commerce and navigation usually provide that the nationals of the respective high contracting parties shall have liberty freely to enter, travel, and reside in the territories of the other … Such treaty provisions do not, however, prevent the contracting parties from enacting and enforcing laws relating to immigration. A surrender of the right to exclude or deport aliens is not to be implied from treaty provisions of a general character." Green Haywood

112. There are also regional treaties which contain special provisions concerning the freedom of movement of nationals of States parties thereto.[210] These regional treaties may limit the ability of a State party to expel aliens who are nationals of another State party as a matter of treaty law.[211]

> "A far-reaching restriction on a state's right to expel aliens may follow from its membership of an organisation such as the EEC, which involves a wide measure of integration

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Hackworth, *Digest of International Law*, vol. III, chapters IX – XI, Washington, Government Printing Office, 1942, p. 718. "Treaties and declarations by which a government stipulates for its citizens a right of sojourn, of acquiring real property, of carrying on an industry on foreign territory, ought not to be interpreted as involving a renunciation on the part of the other contracting power of its right to expel aliens whose conduct should make it desirable." Pradier-Fodéré, P., Traité de droit int. pub., Paris, 1887, III. § 1857 (per Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 49, n. 2). "An examination of cases decided by international courts and tribunals shows that the exclusion or expulsion of aliens by a State finds its juridical basis in the right and duty of the State to safeguard the Nation's welfare and security. … The significance of the right to exclude or expel aliens for reasons of public welfare or security lies in the fact that it cannot be assumed to have been implicitly surrendered by a general convention between two countries which provides that the citizens of each should have the liberty to travel or reside in the territory of the other." Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, Grotius Publications Limited, 1987, pp. 32-33.

[210] *See* Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 273. "It may be that the most effective confinement of the discretionary power of expulsion can be achieved by way of the regional treaty-based organization such as the E.E.C. Here, in matters of entry and expulsion, the concern is with the development of Community law, as similarly, under the European Convention on Human Rights, the concern is with the concept of a European 'ordre public'. It has been suggested also that the measure of expulsion may well be incompatible with the development of a political, economic, and legal community. Expulsion is essentially a measure of self-defence, to be applied in the interests of the community as a whole. In many cases the local law will be adequate to cover criminal infractions, and it is debatable to what extent the discriminatory provision of expulsion is additionally justifiable." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 309-310.

[211] *See*, e.g., Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union, Brussels, 19 September 1960, United Nations, *Treaty Series*, vol. 480, No. 5471, p. 432, at pp. 433-434, which restricts the possible grounds for an expulsion and establishes procedural guarantees. Article 4 of this convention provides: "Without prejudice to the provisions of article 5, nationals of any Contracting Party who are staying or have been authorized to settle in the territory of another Contracting Party may be expelled only if they constitute a threat to public order or national security. For the purposes of this article, the fact of lacking means of subsistence shall not in itself be deemed to represent a threat to public order." Article 5 provides: "Nationals of any Contracting Party who have been established for three years in the territory of another Contracting Party may be expelled only if they constitute a threat to national security or if, having been finally sentenced for a particularly serious crime or offence, they constitute a threat to the community in that country."; and article 7 provides: "Nationals of any Contracting Party who have been authorized to settle in the territory of another Contracting Party may be expelled only after notification of the Minister of Justice of the country of residence by a competent authority of that country, before which the persons concerned may avail themselves of their means of defence and cause themselves to be represented or assisted by counsel of their own choice. In addition, notification of the expulsion order shall be addressed direct, prior to its execution, to the responsible authorities of the Contracting Party of which the person concerned is a national. The notification shall state the grounds for the expulsion."

in social, economic and legal areas, including very wide rights of entry and residence in the territory of one member state for nationals of others."[212]

113. The provisions regulating the expulsion of aliens who are nationals of a State party in the context of regional treaties such as those relating to the European Community (EC) are part of a special legal regime (*lex specialis*) rather than general international law.[213] Nevertheless, some of these provisions may correspond to rules of general international law or contribute to the development of the latter. Moreover, the practice of a treaty-based community and its member States with respect to the expulsion of aliens who are not nationals of a State party would be governed by general international law and therefore certainly be relevant to the consideration of the present topic.[214]

114. The national laws of States may also contain provisions exempting from expulsion the nationals of member States of a regional or other international organization.[215]

G. National law and practice

115. National law and practice play a direct role in the regulation of the international movement of persons, including the entry, the presence, the treatment and the expulsion of aliens. The presence of aliens in the territory of a State may be a source of controversy as a result of the economic, social, ethnic, religious or political implications of their presence.

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[212] Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 942. "A state's right to expel aliens may also be directly or indirectly limited by treaty. Thus Art 3 of the European Convention on Establishment 1955, provides that nationals of a contracting party lawfully residing in another party's territory may be expelled only if they endanger national security or offend against *ordre public* or morality; and, except where imperative considerations of national security otherwise require, such a national who has been lawfully residing there for more than two years cannot be expelled without first being allowed to submit reasons against his expulsion and to appeal to a competent authority." Ibid., pp. 941-942 (citations omitted).

[213] "The law of the EEC forms a special legal order for integration which is distinct from traditional public international law." Rainer Arnold, "Aliens", *in* Bernhardt, Rudolf (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 105.

[214] *See*, in this respect, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, *Official Journal L 16*, pp. 44-53, article 12 (protection against expulsion); Council Directive 2001/40/CE of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, *Official Journal L 149*, 2 June 2001, pp. 34-36, as well as Council Resolution of 4 March 1996 on the status of third country nationals residing on a long-term basis in the territory of the Member States, *Official Journal C 080*, 18 March 1996, pp. 2-4, article VI. Concerning Benelux, *see* the Convention on the Transfer of Control of Persons to the External Frontiers of Benelux Territory, Brussels, 11 April 1960, United Nations, Treaty Series, vol. 374, No. 5323, p. 16, whose article 10 regulates the expulsion of "undesirable" aliens and whose article 11 deals with the deportation of aliens as a consequence of their illegal entry into or illegal movement within a Benelux country.

[215] For example, the United Kingdom exempts from expulsion certain Commonwealth and Irish government officials and staff (United Kingdom, 1972 Order, articles 4(e) and (f)).

> "Few subjects arouse quite the same degree of passionate and partisan argument as the presence of aliens upon State territory. The conditions of their entry, if it be allowed at all, the treatment due to those admitted and the permitted circumstances of their expulsion are matters commonly consigned, without further inquiry, to the realm of sovereign State powers."[216]

116. In the past, it has sometimes been argued that matters relating to immigration, including the entry and expulsion of aliens, are within the domain of the domestic jurisdiction of a State.[217]

> "Questions of immigration, of the entry and expulsion of aliens, fall easily within traditional conceptions of domestic jurisdiction. It is still common to find expressed the view that such matters are for the local State alone to decide, 'in the plenitude of its sovereignty'. In a similar way, it was for long argued that the only rule of international law concerning nationality was that the determination of nationality had nothing to do with international law. Yet that statement itself contains an implied reference to international law and today it is accepted that there are certain restrictions upon States' discretion, or freedom of decision, in the field of nationality. It is well known that in the *Tunis and Morocco Nationality Decrees Case* the Permanent Court of International Justice described the delimitation of domestic jurisdiction as an essentially relative question, which was dependent upon the development of international relations … It is at the point at which seemingly unilateral acts are opposed to other States, and to the rights of other States, that the issue enters upon the international plane. … It is a matter for debate to what extent the subjects of the present inquiry, entry and expulsion, may also touch upon the rights of other States. … Issues arising from the exercise of powers of exclusion and expulsion are commonly affected by matters such as nationality and fundamental human rights. For this reason, any claimed presumption that such powers are sealed within the reserved domain requires close scrutiny."[218]

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[216] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. v. "The effect of s. 21 is to reserve to the Crown, notwithstanding the powers conferred upon the Board by the Act, the right, similar to the prerogative right which existed at common law, to determine that the continued presence in Canada of an alien, subject to a deportation order, would not be conducive to the public good." *Prata v. Minister of Manpower and Immigration,* Supreme Court, 28 January 1975, *International Law Reports*, volume 69, E. Lauterpacht, C.J. Greenwood (eds.), pp. 210-215, at p. 213.

[217] *See*, in general, Robert Y. Jennings, "General Course on Principles of International Law", *Recueil des cours de l'Académie de droit international,* vol. II, tome 121, Leyde, A.W. Sijthoff, 1967, pp. 321-605, at p. 498. "In response to the British Foreign Secretary's request on September 27, 1972 that the General Assembly move to demand that Amin revise his expulsion order of the non-citizen Asians in Uganda, the Uganda Mission to the United Nations issued a policy statement on September 28, 1972, and the Uganda Ambassador addressed the General Assembly on October 6, 1972. Eventually, the United Nations, via a special committee, decided the issue involved Uganda's internal affairs and took no action." (Citations omitted.) John L. III. Bonee, "Caesar Augustus and the Flight of the Asians: the International Legal Implications of the Asian Expulsion from Uganda during 1972", *International Lawyer*, vol. 8, No. 1, 1974, pp. 136-159, at p. 144.

[218] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 51, 52, and 57 (quoting *Ben Tillett's* case: 6 *B.D.I.L.* 124-50, at p. 147) (other citations

117. The broad competence of a State with respect to the presence of aliens in its territory is nonetheless circumscribed by international law.

> "While there can be no doubt that States do possess a broad competence in regard to foreign nationals generally, the central thesis of this work is that such competence is clearly limited and confined by established and emergent rules and standards of international law. On occasion it may be that such limitations operate only at the outermost edges of an apparently illimitable power, as is often the case where expulsion is ordered of an alien deemed to be a risk to national security. But such cases are exceptional, and it is more usual to find the existence of rules which operate to limit the ambit of the power in question and to direct the manner of its exercise. Such rules have their origins in treaty, in the practice of States, and in general principles of law."[219]

118. National law and practice may be of particular relevance to the consideration of the present topic. As a practical matter, national authorities are frequently called upon to deal with issues relating to the expulsion of aliens. Consequently, these issues are often addressed in greater detail in the relevant national laws rather than in international instruments. National law and practice regulates the extent to which as well as the manner in which a State may exercise its right to expel aliens.[220] The national laws which govern the expulsion of aliens may be contained in a single comprehensive law or may be dispersed among various national laws and regulations as well as, in some instances, the constitution of a State.

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omitted). "Similarly, in asserting that the principle of effective nationality is a general principle of international law, and as such is a limitation upon the discretion of States, the International Court of Justice has declared that: 'a State cannot claim that the rules it has … laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.'" Goodwin-Gill, ibid., p. 52 (quoting *Nottebohm Case (Liechtenstein v. Guatemala)*, ICJ Pleadings, *vol. I*, 1955, p. 4 at p. 23). *See also* United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955, pp. 1-77. (ST/SOA.22 and Corr.2 (replaces Corr.1)), para. 102. *See also Expulsions from Zambia:* British Practice in International Law, 1966, p. III; ibid., 1967, pp. 112-113; and Ian Brownlie, *Principles of Public International Law* (2nd ed., 1973), pp. 284-285 (per Goodwin-Gill).

[219] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. v.

[220] "Finally, the domestic laws of many states impose restraints upon the exercise by the relevant state authorities of the right to order the expulsion of aliens." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 943. "it is internationally accepted that a sovereign State has the right to refuse admission to an alien to enter the country, to impose conditions as to his entry or stay and to expel and deport at pleasure even a friendly alien, especially if it is considered that his presence is opposed to its peace, order and good government, or to its social and material interest. *See Attorney General of Canada* v. *Cain,* [1906] A.C. 542. In *Kyi Chung York* v. *The Controller of Immigration,* (1951) B.L.R. (S.C.) 197, this Court has observed that the above-mentioned principle, followed by the comity of nations, is embodied in Section 3 of the Foreigners Act which provides for the removal of a foreigner by order of the President." *Karam Singh v. Controller of Immigration,* Burma, Supreme Court, 25 June 1956 *International Law Reports*, volume 28, E. Lauterpacht (ed.), pp. 311-313.

> "… States have the competence to regulate the movement of persons across their borders by adopting appropriate laws and regulations relating to such matters as passports, admission, expulsion and status of aliens and immigration. These rules may be dispersed amongst various enactments or may constitute a coherent system regulating all aspects of the movement of persons across borders. Some rules such as those relating to the right to leave one's country or the right of asylum may be found in a State's constitution."[221]

119. National law and practice may be relevant to the consideration of the present topic to the extent that it may reflect rules of customary international law or contribute to their development.[222] However, it may be necessary to adopt a cautious approach to the consideration of *opinio juris* in this matter in view of the wide discretion exercised by States in relation to the expulsion of aliens as well as significant variations in the relevant national laws.[223]

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[221] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 9-10. "In Britain the Crown has had a Royal Prerogative to expel aliens and send them home, whenever it considered that their presence in Britain was not conducive to the public good. This prerogative has, at least since 1953, been supplanted by statute. … Accordingly, the State's power to deport, relevant to the present case, can be derived only from the provisions of the Act." *Mohamed and Another v. President of the Republic of South Africa and Others*, Constitutional Court, 28 May 2001 *International Law Reports*, volume 127, E. Lauterpacht (ed.), C.J. Greenwood, A.G. Oppenheimer, pp. 469-500, at p. 482 (citation omitted).

[222] "The power of expulsion is a sovereign right, in that it pertains to every State for that State's protection, but it is a power which is controlled and limited, particularly by treaty obligations, and generally, by the obligations imposed by customary international law." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 310.

[223] "Concordance of municipal law does not yet create customary international law; a universal consensus of opinion of States is equally necessary. It is erroneous to attempt to establish rules of international law by methods of comparative law, or even to declare that rules of municipal law of different States which show a certain degree of uniformity are rules of international law." Paul Weis, *Nationality and Statelessness in International Law*, London, 1956, p. 98 (per Ian Brownlie, "The Relations of Nationality in Public International Law", *The British Year Book of International Law*, vol. 39, 1963, pp. 284-364, at p. 312. "This statement of principle is unexceptionable in so far as the reversal of the statement would result in a proposition obviously much too dogmatic. However, in substance, Weis is thought to underestimate the significance of legislation as evidence of the opinion of States, particularly in view of the facts that it is impossible to expect all areas of law to be covered by the diplomatic correspondence of each State and that, even where issues have been on the diplomatic agenda, the correspondence may remain unpublished. … First, there is something strange in an analysis which remains firmly sceptical about the value of legislation on nationality as evidence of international custom, when many writers commonly assert the existence of rules on the basis of a practice much less consistent and uniform than many of the rules considered above. Secondly, such lack of uniformity as there is in nationality laws is explicable not in terms of a lack of *opinio juris*, but by reference to the fact that inevitably municipal law makes the attribution in the first place, and also to the occurrence of numerous permutations and hence possible points of conflict in legislation on a subject-matter so mobile and complex. There is no evidence that there is an absence of *opinio juris* …" Brownlie, ibid., pp. 312-313 (commenting on Weis's preceding statement in the context of nationality law). (Citations omitted.)

> "Possible limitations upon the power of expulsion can be seen in the provisions of certain municipal systems … However, the intention is not, without more, to propose as rules of customary international law those which commonly figure as rules of municipal law. Indeed, it may be that the large measure of discretion which municipal systems concede to their respective executive authorities makes it less than usually possible to presume *opinio juris* on the basis of actual practice. Nevertheless, there can be no doubt of the important influence which the standards of international law have had on the manner of exercise of the power and on the development of the principle that decisions in such matters be 'in accordance with law'."[224]

120. Furthermore, a consideration of the relevant national law and practice of States representing different legal systems and different regions of the world may support the finding of general principles that would govern the expulsion of aliens by a State.[225]

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[224] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 237 (citations omitted). "National legal systems, however, often restrict the lawfulness of expulsion, but those restrictions are not based on international duties." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 111.

[225] "The emphasis on control of discretion and on the permissible limits of its exercise is commonly found in municipal law and, to that extent, may support the finding of a general principle." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 308-309.

IV. USE OF TERMS

121. There are a number of terms the understanding of which is important to the consideration of the present topic. The use of these terms has been addressed in various sources, including treaties, other international documents, national legislation,[226] national jurisprudence as well as literature. The relevance of some of the terms discussed below depends upon the delineation of the scope of the topic.

A. Terms relating to aliens

1. Alien

122. The term "alien" is generally understood as referring to a natural person[227] who is not a national of the State concerned. Thus, the main criterion for determining the status of an individual as an alien is nationality.[228] The term "alien" may include foreign nationals as well as stateless persons.[229]

123. As early as 1892, the Institut de Droit International defined the term "aliens" based on "a current right of nationality" regardless of the duration of their stay or whether the initial entry was voluntary, as follows:

> "Aliens, within the meaning of this regulation, means all those who do not have a current right of nationality in the State without distinguishing as to whether they are simply visitors, or are resident domiciled in it or whether they are refugees or have entered the country voluntarily."[230]

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[226] Differences in the terminology used in the national legislation of States as discussed herein may be due to some extent to the translation of the relevant terms from the various official languages of the original laws.

[227] "In the strict sense of the term, a foreign corporation is not an alien." Rainer Arnold, "Aliens", in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 102.

[228] "In characterizing a person either expressly or implicitly as an alien, the general criterion seems to be that of a person's nationality." Ibid., p. 102. "An alien is a person who is not a citizen or national of the State concerned." Principles concerning admission and treatment of aliens (adopted by the Asian-African Legal Consultative Committee at its fourth session), article 1, reproduced in *Yearbook of the International Law Commission*, 1961, vol. II, pp. 82-83.

[229] "'Alien' means an individual who does not hold the nationality of the host country or the country of residence but who is bound by a link of nationality to the State from which he or she comes – the State of origin – or who holds no nationality at all and is thus in a situation of statelessness." Maurice Kamto, Special Rapporteur, Preliminary report on the expulsion of aliens, *International Law Commission*, A/CN.4/554, para. 7. "In order to define the term 'alien', internal legal orders must comply with the restrictive directives of international law. Under these rules stateless persons are also to be considered as aliens." Rainer Arnold, note 227 above, p. 102.

[230] *Règles internationales*, note 56 above, article 1 [French original].

124. In 1985, the General Assembly adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live. The Declaration also defines the term "alien" based on the nationality criterion. This definition would appear to include stateless persons although they are not specifically mentioned.

> "For the purposes of this Declaration, the term 'alien' shall apply, with due regard to qualifications made in subsequent articles, to any individual who is not a national of the State in which he or she is present."[231]

125. The term "alien" is used in the national laws of a number of States. [232] This term is defined in national legislation as referring to a person[233] who is not a State's citizen,[234] national,[235] or either.[236] Resident aliens may or may not be included within the definition of an alien; and illegal aliens may be

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[231] Resolution 40/144, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they live, 13 December 1985, article 1. *See* Richard B. Lillich, "The Problem of the Applicability of Existing International Provisions for the Protection of Human Rights to Individuals who are not Citizens of the Country in which They Live" (Editorial Comment), *American Journal of International Law*, vol. 70, 1976, pp. 507-510.

[232] Argentina, 2004 Act, article 2; Austria, 2005 Act, article 3.2(4); Bosnia and Herzegovina, 2003 Law, article 4; China, 1986 Law, article 31; Czech Republic, 1999 Act, section 1(2); Finland, 2004 Act, section 3(1); Greece, 2001 Law, article 1; Guatemala, 1986 Decree Law, article 11; Honduras, 2003 Act, article 3(7); Japan, 1951 Order, article 2.2(2); Kenya, 1973 Act, article 2; Lithuania, 2004 Law, article 2(32); Nigeria, 1963 Act, article 52(1); Poland, 2003 Act No. 1775, article 2; Slovenia, 2003 Act, article 2; Sudan, 2003 Act, section 3; United Kingdom, 1981 Act, section 50(1); and United States, INA, section 101(a)(3).

[233] The laws of some States specify that an alien is a natural person (Czech Republic, 1999 Act, section 1(2); and Russian Federation, 2002 Law No. 115-FZ, article 2).

[234] Austria, 2005 Act, article 3.2(4); Bosnia and Herzegovina, 2003 Law, article 4; Bulgaria, 1998 Law, article 2(1); Canada, 2001 Act, article 2; Croatia, 2003 Law, article 2; Finland, 2004 Act, section 3(1); Greece, 2001 Law, article 1; Kenya, 1973 Act, article 2; Poland, 2003 Act No. 1775, article 2; Russian Federation, 2002 Law No. 115-FZ, article 2; Slovenia, 2003 Act, article 2; and South Africa, 2002 Act, article 1(1)(xvii).

[235] China, 1986 Law, article 31; Czech Republic, 1999 Act, section 1(2); France, Code, article L111-1; Guatemala, 1986 Decree Law, article 11, Honduras, 2003 Act, article 3(7); Hungary, 2001 Act, article 2(1)(a); Japan, 1951 Order, article 2.2(2); Lithuania, 2004 Law, article 2(32); Madagascar, 1994 Decree, article 3.3; Norway, 1988 Act, section 48; Portugal, 1998 Decree-Law, article 2; Republic of Korea, 1992 Act, article 2(2); Spain, 2000 Law, article 1; Sudan, 2003 Act, section 3; and Tunisia, 1968 Law, article 1. In 1927, the Council of State of Estonia stated: "All persons not possessing Estonian nationality are aliens within the meaning of the Law concerning Public Security. … All persons who are not nationals of the Republic are aliens." *George Talma et Al. v. Minister of the Interior*, Council of State of Estonia, 14 October 1927, *Annual Digest and Reports of Public International Law Cases*, 1935-1937, H. Lauterpacht (ed.), Case No. 142, p. 313.

[236] Germany, 2004 Act, article 2(1), citing Basic Law, article 116; and United States, INA, section 101(a)(3), (22).

excluded therefrom.[237] Stateless persons may be included in the definition of an "alien"[238] or treated on an equal footing with "aliens".[239] Other terms may be used to refer to the notion of an "alien" in national legislation, such as "foreigner", [240] "foreign national" [241] or "foreign citizen".[242] The term "immigrant" may also be used to partly or fully cover the notion of "alien".[243] The law may also provide for an intermediate status between nationals and aliens such as "non-aliens". [244]

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[237] Guatemala specifically includes residents within the definition of the term "alien" (Guatemala, 1986 Decree Law, article 12), while Canada expressly excludes permanent residents (Canada, 2001 Act, article 2), and South Africa expressly excludes both residents and "illegal foreigners" (South Africa, 2002 Act at 1(1)(xvii)).

[238] Bosnia and Herzegovina, 2003 Law, article 4; Canada, 2001 Act, article 2; France, Code, article L111-1; Greece, 2001 Law, article 1; Guatemala, 1986 Decree Law, article 12; Hungary, 2001 Act, article 2(1)(a); Lithuania, 2004 Law, article 2(32); Madagascar, 1994 Decree, article 5; Tunisia, 1968 Law, article 1; and United Kingdom, 1981 Act, section 50(1). Belarus includes persons who do not hold any evidence of citizenship in a State other than Belarus (Belarus, 1993 Law, article 1).

[239] "According to article 62 (part 3) of the Constitution of the Russian Federation, aliens and stateless persons have in the Russian Federation rights and obligations on the same footing as nationals of the Russian Federation, with the exceptions specified in federal legislation or international treaties concluded by the Russian Federation." *Ruling No. 6, Case of the review of the constitutionality of a provision in the second part of article 31 of the USSR Act of 24 July 1981, "On the legal status of aliens in the USSR" in connection with the complaint of Yahya Dashti Gafur,* Constitutional Court of the Russian Federation, 17 February 1998, para. 4.

[240] Bulgaria, 1998 Law, article 2(1); Croatia, 2003 Law, article 2; Ecuador, 2004 Law, article 12; France, Code, article L111-1; Germany, 2004 Act, article 2(1); Hungary, 2001 Act, article 2(1)(a); Madagascar, 1994 Decree, articles 3.3, 5; Portugal, 1998 Decree-Law, article 2; Republic of Korea, 1992 Act, article 2(2); South Africa, 2002 Act, article 1(1)(xvii); and Tunisia, 1968 Law, article 1.

[241] Canada, 2001 Act, article 2; Norway, 1988 Act, section 48; and Spain, 2000 Law, article 1.

[242] The term "foreign citizen" is used if the alien holds evidence of citizenship elsewhere: Belarus, 1998 Law, article 3, and 1993 Law, article 1; and Russian Federation, 2002 Law No. 115-FZ, article 2.

[243] Nigeria's legislation defines "immigrant" as any non-citizen without diplomatic immunity "who enters or seeks to enter Nigeria." (Nigeria, 1963 Act, article 52(1)). The United States' legislation deems an alien an "immigrant" unless the alien falls within one of a number of categories of those deemed "non-immigrants," (United States, INA, section 101(a)(15)), or otherwise does not satisfactorily establish entitlement to "non-immigrant" status (United States, INA, section 214(b)). Madagascar's legislation classifies "foreigners" as either "immigrants," "non-immigrants" or, as a third category, stateless persons and refugees, with "non-immigrants" being persons staying in the territory for three months or less, and "immigrants" being those who stay beyond that point (Madagascar, 1994 Decree, articles 5-7). Argentina's legislation uses the term "immigrant" when referring to any alien desiring to lawfully enter, transit, reside or settle in Argentina on a definitive, temporary or transitory basis (Argentina, 2004 Act, article 2). Guatemala's legislation defines an "immigrant" as an alien who, having proved his or her good character, morals, skills and economic capacity, comes to Guatemala with prior authorization to establish residence in the country (Guatemala, 1986 Decree Law, articles 12 and 15). The legislation of Belarus equates "immigrants" with permanent residents (Belarus, 1998 Law, article 3).

[244] "Other criteria such as the common allegiance pledged to the Crown by British subjects even when they are not of British nationality may be considered sufficient for them to be given the status of non-aliens." Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier

126. The definition of the term "alien" provided for in national law is recognized by other States to the extent that it is consistent with international law.[245]

2. Illegal alien

127. The term "illegal alien" is generally understood as referring to an alien whose status is illegal as a result of failing to comply with the relevant national laws of the territorial State concerning the admission, the continuing presence, the permitted activities or the residence of aliens. Thus, an alien may be illegal from the moment of crossing the border of the territory of another State without complying with the national immigration laws concerning admission. In addition, an alien who is lawfully admitted to the territory of another State may acquire illegal status by subsequently failing to comply with the national laws governing the presence of aliens, for example by remaining in the territory beyond the period specified by the immigration officials at the time of entry or by engaging in activities not permitted by the visa or other entry document. [246] In some instances, an illegal alien may subsequently acquire lawful status.[247]

128. Although some treaties distinguish between legal and illegal aliens, they do not provide a definition of the term "illegal alien".[248]

Science Publishers, vol. 1, 1992, pp. 102-107, at p. 102. "In a Commonwealth country, the status of the nationals of other Commonwealth countries shall be governed by the provisions of its laws, regulations and orders." Principles concerning admission and treatment of aliens (adopted by the Asian-African Legal Consultative Committee at its fourth session), reproduced in *Yearbook of the International Law Commission*, 1961, vol. II, pp. 82-83, article 1. The United Kingdom defines an "alien" as "a person who is neither a Commonwealth citizen nor a British protected person nor a citizen of the Republic of Ireland" (United Kingdom, 1981 Act, section 50(1)). Nigeria defines an "alien" as "any person not a Commonwealth citizen or a citizen of Eire" (Nigeria, 1963 Act, article 52(1)). The fact that a person does not fall within the definition of "an alien" does not mean that they would qualify as a "national".

[245] "The question whether a person is to be classified as an alien or not is one of a State's municipal law. As far as the determination is consistent with public international law, it is also to be recognized by the legal order of other States." Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 102.

[246] *See*, e.g. *United States Ex Rel. Zapp. et al. v. District Director of Immigration and Naturalization*, Circuit Court of Appeals, Second Circuit, 6 June 1941, *Annual Digest and Reports of Public International Law Cases*, 1941-1942, H. Lauterpacht (ed.), Case No. 91, pp. 304-308 (Aliens expelled because they no longer exercised the trade they were admitted to exercise); and *Espaillat-Rodriguez v. The Queen*, Supreme Court, 1 October 1963, *International Law Reports*, volume 42, E. Lauterpacht (ed.), pp. 207-210.

[247] For example, the status of an illegal alien may be regularized by, *inter alia*, remaining in the territory of the host State for a certain period of time. See *Re Sosa*, Supreme Court of Argentina, 23 March 1956, *International Law Reports*, 1956, H. Lauterpacht (ed.), pp. 395-397.

[248] Some international treaties contain provisions on expulsion which apply only to aliens lawfully present in the territory of a State. *See*, in particular, International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 4668, p. 171, article 13; Protocol relating to the

129. The term "illegal alien"[249] and other similar terms are used in the national laws of several States to refer to aliens[250] who initially lack or subsequently lose their legal status, including "illegal immigrant",[251] "illegal foreigner",[252] "unlawful non-citizen",[253] "prohibited immigrant",[254] "prohibited person",[255] "forbidden individual"[256] and "immigration offender".[257] The term "illegal alien" and similar terms are defined in the legislation of some States based on an initial illegal entry or a subsequent illegal presence.[258]

3. Resident alien

130. The term "resident alien" is generally understood as referring to an alien who has been admitted to and has resided in the territory of a State for a period of time in accordance with the relevant national laws.

131. The notion of "resident alien" as a special category of aliens is implicitly recognized in treaties which address the specific rights of aliens who have resided in a State for a certain period of time.[259]

Status of Refugees, New York, 31 January 1967, United Nations, *Treaty Series*, vol. 606, No. 8791, p. 267, article 32; Convention relating to the Status of Stateless Persons, New York, 28 September 1954, United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117, article 31, and European Convention on Establishment (with Protocol), Paris, 13 December 1955, United Nations, *Treaty Series*, vol. 529, No. 7660, p. 141, article 3. These provisions are discussed below.

[249] Honduras, 2003 Act, article 3(15).

[250] In Kenya, an illegal alien's dependent may also be given such status. Kenya, 1967 Act, article 3(1)(l).

[251] Belarus, 1998 Law, article 3; and Honduras, 2003 Act, article 3(15).

[252] South Africa, 2002 Act, article 1(1)(xviii).

[253] Australia, 1958 Act, articles 14-15.

[254] Kenya, 1967 Act, article 3(1); and Nigeria, 1963 Act, article 52(1).

[255] South Africa, 2002 Act, articles 1(1) (xxx) and 29.

[256] Belarus, 1993 Law, article 20(6).

[257] Republic of Korea, 1992 Act, article 2(13).

[258] Belarus defines "illegal immigration" as an entry into, or stay on, its territory in violation of its relevant law (Belarus, 1998 Law, article 3). Kenya classifies an alien's presence on its territory as unlawful unless the alien possesses a "valid entry permit or a valid pass," or is otherwise authorized to be present under Kenyan law (Kenya, 1967 Act, article 4). The United Kingdom defines an "illegal entrant" as a person who unlawfully enters or seeks to enter its territory in breach of a deportation order or of the immigration laws, or by means which include deception by another person (United Kingdom, 1971 Act, section 33(1), as amended by the Asylum and Immigration Act 1996, Sch. 2, para. 4). The United States defines an alien's presence as unlawful if the alien has not been "admitted or paroled" into its territory or remains after the expiration of the authorized stay (United States, INA, section 212(a)(9)(B)(ii)).

[259] *See,* for example, European Convention on Establishment, article 3:

The term "resident alien" is defined in some international instruments on the basis of three elements, namely, lawfulness, continuity and duration ranging from 2 to 10 years.[260]

132. The notion of a "resident alien" also appears in the national legislation of some States. The definition of a resident alien contained in various national laws includes the common elements of

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"1. Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against *ordre public* or morality.

2. Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority.

3. Nationals of any Contracting Party who have been lawfully residing for more than ten years in the territory of any other Party may only be expelled for reasons of national security or if the other reasons mentioned in paragraph 1 of this article are of a particularly serious nature."

[260] Concerning the European Union, *see* Council Resolution of 4 March 1996 on the status of third country nationals residing on a long-term basis in the territory of the Member States, *Official Journal C 080*, 18 March 1996, pp. 2-4, article III:

"1. Without prejudice to the provisions of Point IV, the following third-country nationals should be recognized in each Member State, as long-term residents:

- those who provide proof that they have resided legally and without interruption in the territory of the Member State concerned for a period specified in the legislation of that Member State and, in any event, after 10 years' legal residence,
- those who, under the legislation of the Member State concerned, are granted the same residence conditions as the category of persons referred to in the first indent.

2. In accordance with their national laws, Member States should grant a residence authorization for at least 10 years, or for a period corresponding to the longest period of validity under their national law, which should tend to be of equivalent length, or an unlimited residence authorization, to persons recognized as being long-term residents in accordance with paragraph 1 (1)."

See also Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, *Official Journal L 16*, pp. 44-53:

"*Article 2* – Definitions: For the purposes of this Directive: [...] (b) 'long-term resident' means any third-country national who has long-term resident status as provided for under Articles 4 to 7";

"*Article 4* – Duration of residence: 1. Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application. [...]"

"*Article 6* – Public policy and public security: 1. Member States may refuse to grant long-term resident status on grounds of public policy or public security. [...]"

"*Article 7:* Acquisition of long-term resident status 1. To acquire long-term resident status, the third-country national concerned shall lodge an application with the competent authorities of the Member State in which he/she resides. The application shall be accompanied by documentary evidence to be determined by national law that he/she meets the conditions set out in Articles 4 and 5 as well as, if required, by a valid travel document or its certified copy. [...]"

lawfulness, continuity and duration. The national law may also provide for different categories of resident aliens.[261]

133. The notion of a resident alien has also been considered by the national courts of various States. The Supreme Court of Ireland has addressed the requirement of lawful (or ordinary)[262] residence.[263] The Supreme Court of Argentina as well as the Supreme Court of Costa Rica have addressed the status of long-term residents in the territorial State as *de facto* resident aliens.[264]

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[261] "Regimes for the control of aliens within national frontiers vary considerably between States, and in the countries of continental Europe the system of residence permits is a common feature. For example, in France, three categories of permits are employed, involving distinctions between temporary, ordinary, and privileged residents." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 251.

[262] "It seems that the term 'ordinarily resident' may best be compared with the term 'lawfully staying' ..." Atle Grahl-Madsen, *The Status of Refugees in International Law; Asylum, Entry and Sojourn*, vol. II, Leiden, A. W. Sijthoff, 1972, p. 340, No. 29.

[263] The case involved an alien member of the German Air Force who parachuted into Ireland during the Second War for the purpose of carrying out a military mission. The appellant claimed he was entitled to three months' notice prior to deportation since he had been an ordinary resident for the required period under the relevant national law. The Supreme Court held that that the alien was not an "ordinary resident" within the meaning of the Act since "mere physical presence of an alien here for the requisite period" could not constitute "ordinary residence". *The State (at the prosecution of Hermann Goertz) v. The Minister of State,* Eire, Supreme Court, 2 and 5 May 1947, *Annual Digest and Reports of Public International Law Cases*, 1948, H. Lauterpacht (ed.), Case No. 83, pp. 276-277. "It appears that the Court placed emphasis on the appellant's illegal entry for the purpose of carrying out a military mission for a foreign power and on the fact that there was no evidence to the effect that during the period he was in hiding or interned, he intended to reside in the country, save in the sense that he intended to remain there physically in order to carry out the object he had in view." Atle Grahl-Madsen, *The Status of Refugees in International Law; Asylum, Entry and Sojourn*, vol. II, Leiden, A. W. Sijthoff, 1972, p. 340, No. 28.

[264] "In another case (Fallos de la Corte Suprema, vol. 200, p. 99), the Court, reaffirming the power of the Government to regulate and control the admission of aliens in conformity with constitutional requirements and in consideration of the common good, pointed out that no particular time-limit had been prescribed by law whereby an illegal entrant could regularize his status to that of legal entrant and become a lawful resident. Nevertheless, the Court noted the possibility that such irregular status can be purged in a case where a person has not only presented a past record of good conduct but has also demonstrated within this country over a period of time of reasonably sufficient duration his loyalty to the country and his attachment to its national principles, thereby qualifying him to invoke the constitutional guarantee of permanent residence in this country." *Re Sosa,* Supreme Court of Argentina, 23 March 1956, *International Law Reports*, 1956, H. Lauterpacht (ed.), pp. 395-397 (concerning an alien who was a lawful resident for five years). See also *Re Leiva,* Cámara Nacional de Apelaciones de Resistencia of Argentina, 20 December 1957, *International Law Reports*, 1957, H. Lauterpacht (ed.), p. 490 ("[O]nce an alien has been admitted into the country, he is to be treated as a resident thereof."). The Supreme Court of Costa Rica, in 1938, also considered the status of an alien as a consequence of residence in the territory of a State for an extended period. *In re Rojas et al.*, Supreme Court of Costa Rica, 26 July 1938, *Annual Digest and Reports of Public International Law Cases*, 1938-1940, H. Lauterpacht (ed.), Case No. 140, pp. 389-390 (concerning two aliens who had resided in the State for six years and fifteen years, respectively).

4. Migrant worker

134. The term "migrant worker" is generally understood as referring to a person who has travelled to a foreign country in order to obtain gainful employment.[265] There are different categories of foreign workers depending on the duration of their stay in the State of employment, the location of their employment and their status as legal or illegal aliens. The term "migrant worker" does not necessarily include all such foreign workers. For example, seasonal workers[266] as well as frontier workers[267] are sometimes excluded from the definition of "migrant workers".[268]

> "There are different types of foreign workers. In most cases a worker leaves his country of origin for a long period of time, stays in the receiving country continuously, and eventually returns to his home. There are also seasonal workers, who work in a foreign country for several months before returning home. This type of migration is especially common in certain types of work, such as construction or the hotel business. When the construction stops or the business closes, the worker travels back to his home until the new season begins. This type of migration is also seen between countries bordering each other, as in the case of Mexican workers who come to the United States during the harvest months. Some countries, such as Switzerland, actually encourage seasonal foreign workers, since this type of labour reduces some of the social and financial problems.
>
> "Migrant workers may also be classified as legal and illegal, according to their possession (or lack thereof) of residence and work permits. The majority of foreign workers in Western Europe today are present there legally, but according to rough estimates, about 10 per cent of the foreign labour force is working without proper work permits. In the United States, too, where the control of foreign entrants at the border is comparatively easier than in Europe, it is estimated that about 656,000 aliens are working illegally. The legal problems of these

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[265] "The migrant worker is, in the broadest sense, a person who works in a foreign country for somebody else." Tugrul Ansay, "Legal Problems of Migrant Workers", *Recueil des cours de l'Académie de droit international*, vol. III, tome 156, 1977, pp. 7-77, at p. 7.

[266] "The term 'seasonal worker' refers to a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year." International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, New York, 18 December 1990, United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3, at p. 95, article 2, para. 2, lit. b). "Seasonal workers have no intention of staying continuously; they are usually exempted from permits which are necessary for normal workers." *See* Tugrul Ansay, "Legal Problems of Migrant Workers", *Recueil des cours de l'Académie de droit international*, vol. III, tome 156, 1977, pp. 7-77, at p. 56, No. 6.

[267] "The term 'frontier worker' refers to a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week." International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, note 266 above, article 2, para. 2, lit. a).

[268] "Frontier workers are not generally treated as migrant workers." Tugrul Ansay, "Legal Problems of Migrant Workers", *Recueil des cours de l'Académie de droit international*, vol. III, tome 156, 1977, pp. 7-77, at p. 56, No. 7.

clandestine workers are even more complicated than those of the legitimate migrant workers."[269]

135. Some treaties define the term "migrant worker"[270] with slight variations. The common element of these definitions is that they refer to individuals who have migrated from one country to another in order to take up paid employment. However, the various definitions differ regarding the inclusion or exclusion of certain categories of workers, such as seasonal workers, frontier workers and self-employed persons.

136. Article 11 of International Labour Organization (ILO) Convention (No. 143) Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers provides, for the purposes of Part II of the Convention (dealing with equality of opportunity and treatment), a definition of the term "migrant worker" which excludes self-employment as well as specified categories of workers, among which are frontier workers, artists and members of liberal professions who have entered the country on a short-term basis, seamen, trainees as well as certain kinds of temporary employment.[271]

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[269] Tugrul Ansay, "Legal Problems of Migrant Workers", *Recueil des cours de l'Académie de droit international*, vol. III, tome 156, 1977, pp. 7-77, at p. 8 (citations omitted).

[270] "In existing instruments, the term 'foreign migrant workers' is broadly understood to designate persons who wish to settle in another country for a considerable period of time with a view to being employed otherwise than on their own account." Maxime Tardu, "Migrant Workers", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 3, 1997, pp. 364-369, at p. 364. *See also* Tugrul Ansay, "Legal Problems of Migrant Workers", *Recueil des cours de l'Académie de droit international*, vol. III, tome 156, 1977, pp. 7-77, at pp. 7-8.

[271] Convention (No. 143) Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, adopted by the General Conference of the International Labour Organisation on 24 June 1975, United Nations, *Treaty Series*, vol. 1120, No. 17426, p. 323, article 11:

> "1. For the purpose of this Part of this Convention, the term migrant worker means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker.
>
> "2. This Part of this Convention does not apply to:
>
> (a) frontier workers;
>
> (b) artistes and members of the liberal professions who have entered the country on a short-term basis;
>
> (c) seamen;
>
> (d) persons coming specifically for purposes of training or education;
>
> (e) employees of organizations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments."

137. Article 1 of the European Convention on the Legal Status of Migrant Workers provides a definition of the term "migrant worker" which covers individuals who have been authorized to reside in a country other than that of their own nationality in order to take up paid employment. This definition is very similar to the one contained in the ILO Convention inasmuch as it excludes frontier workers, artists, seamen, trainees and, to some extent, temporary workers. However, contrary to the ILO Convention, the European Convention does not apply to members of liberal professions (regardless of the duration of their stay in the territory of the foreign State) or seasonal workers.[272]

138. The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families provides a similar but more detailed definition of the term "migrant worker". Consistent with the previous conventions, this convention does not apply to some categories of workers such as trainees and, to a certain extent, seafarers and workers. Moreover, this convention does not apply to persons employed by international organizations or by a State, whose status is determined by general international law or international conventions, or, subject to some exceptions, to refugees and stateless persons. Contrary to the previous conventions, this convention covers frontier workers, seasonal workers as well as self-employed persons.[273]

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[272] European Convention on the Legal Status of Migrant Workers, Strasbourg, 24 November 1977, United Nations, *Treaty Series*, vol. 1496, No. 25700, p. 3, article 1:

"1. For the purpose of this Convention, the term "migrant worker" shall mean a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment.

"2. This Convention shall not apply to:

a) frontier workers;

b) artists, other entertainers and sportsmen engaged for a short period and members of a liberal profession;

c) seamen;

d) persons undergoing training;

e) seasonal workers; seasonal migrant workers are those who, being nationals of a Contracting Party, are employed on the territory of another Contracting Party in an activity dependent on the rhythm of the seasons, on the basis of a contract for a specified period or for specified employment;

f) workers, who are nationals of a Contracting Party, carrying out specific work in the territory of another Contracting Party on behalf of an undertaking having its registered office outside the territory of that Contracting Party."

[273] International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, note 266 above, articles 2 and 3:

"Article 2

For the purposes of the present Convention:

"1. The term 'migrant worker' refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

"2.(a) The term 'frontier worker' refers to a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week;

(b)The term 'seasonal worker' refers to a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year;

(c) The term 'seafarer', which includes a fisherman, refers to a migrant worker employed on board a vessel registered in a State of which he or she is not a national;

(d) The term 'worker on an offshore installation' refers to a migrant worker employed on an offshore installation that is under the jurisdiction of a State of which he or she is not a national;

(e) The term 'itinerant worker' refers to a migrant worker who, having his or her habitual residence in one State, has to travel to another State or States for short periods, owing to the nature of his or her occupation;

(f) The term 'project-tied worker' refers to a migrant worker admitted to a State of employment for a defined period to work solely on a specific project being carried out in that State by his or her employer;

(g) The term 'specified-employment worker' refers to a migrant worker:

(i) Who has been sent by his or her employer for a restricted and defined period of time to a State of employment to undertake a specific assignment or duty; or

(ii) Who engages for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialized skill; or

(iii) Who, upon the request of his or her employer in the State of employment, engages for a restricted and defined period of time in work whose nature is transitory or brief; and who is required to depart from the State of employment either at the expiration of his or her authorized period of stay, or earlier if he or she no longer undertakes that specific assignment or duty or engages in that work;

(h) The term 'self-employed worker' refers to a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his or her living through this activity normally working alone or together with members of his or her family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

"Article 3

The present Convention shall not apply to:

(a) Persons sent or employed by international organizations and agencies or persons sent or employed by a State outside its territory to perform official functions, whose admission and status are regulated by general international law or by specific international agreements or conventions;

(b) Persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other co-operation programmes, whose admission and status are regulated by agreement with the State of employment and who, in accordance with that agreement, are not considered migrant workers;

(c) Persons taking up residence in a State different from their State of origin as investors;

(d) Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned;

(e) Students and trainees;

(f) Seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment."

139. The national laws of some States provide a definition of the term "migrant worker". These laws may distinguish between different categories of "migrant workers" such as employees and self-employed persons.[274]

5. Family

140. The notion of the family unit may vary from one country, society or culture to another.[275] There appears to be general agreement that the family includes a person and his or her spouse as well as minor or dependent children. The status of other relatives by blood or marriage is less clear (e.g., fiancé or fiancée, parents, grandparents, siblings and aunts and uncles). There are also questions concerning the status of adopted children, children born out of wedlock and polygamous spouses.[276]

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[274] For example, Honduras defines a migrant worker as an alien with a valid permit who enters the country temporarily to engage in a remunerated activity (Honduras, 2003 Act, article 3(28)). Cameroon distinguishes between, on the one hand, "contractual workers," who are either salaried foreigners in the private sector in Cameroon, foreigners working in the public or quasi-public sectors under an employment contract, or technical assistance personnel, and, on the other hand, "independent workers," who are persons practicing on an individual basis a liberal, commercial, industrial, agricultural, pastoral, cultural or artisanal profession (Cameroon, 2000 Decree, articles 12-14).

[275] "There is not a single, internationally accepted definition of the family, and international law recognizes a variety of forms. The existence of a family tie is a question of fact, to be determined on a case-by-case basis. Certainly the nuclear family is the most widely accepted for family unity and reunification purposes." Kate Jastram, "Family Unity" in Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 185-201, at p. 197 (citing Human Rights Committee, 32nd session, 1988, *General Comment No. 16*, para. 5 (8 April 1988); Human Rights Committee, 39th session, 1990, *General Comment No. 19*, para. 2 (27 July 1990); Human Rights Committee, *General Comment No. 28 on Article 3*, UN Doc. CCPR/C/21/Rev.l/Add.lO, para. 27 (29 March 2000); and Council of Europe Recommendation No. R (99) 23 of the Committee of Ministers to Member States on family reunion for refugees and other persons in need of international protection, 15 December 1999, at para. 2. "[T]he definition of family applied by the receiving state may be different than that used by the immigrant family." Alexander T. Aleinikoff, note 119 above, p. 18. "In the principal States of immigration in the industrialised Western world, the basic provisions governing the definition of the family are sufficiently proximate to bear comparison; but even among States in this group the disparities are often striking." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 375.

[276] "Moreover, it is not obvious that a monogamous State experiencing immigration from polygamous States must as a matter of public policy always decline to treat a polygamous wife as a spouse for the purposes of immigration." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 384. The same may be said by analogy with respect to the consideration of a polygamous spouse in the context of expulsion proceedings. However, the consideration of the family as a factor in determining the expulsion of an alien may be complicated by the presence of polygamous spouses in different States. See also *Latiefa v. Principal Immigration Officer*, Supreme Court of South Africa, Cape Provincial Division, 30 April 1951, *International Law Reports*, 1951, H. Lauterpacht (ed.), Case No. 89, pp. 294-299, at p. 297 (Second marriage of polygamist not recognized for immigration purposes).

141. The notion of "family" is addressed in various international instruments, including the International Covenant on Civil and Political Rights[277] and the European Convention on Human Rights.[278] However, there is a lack of uniformity in the use of the term "family".

> "The concept of 'family unity', which has been adopted by major legal systems of the world, has found expression in numerous instruments concerning international protection of human rights. They vary, however, in determining which categories of persons are to be considered members of the family. While there can be no doubt that a person's spouse and minor children are to be so regarded, the practice is not uniform as regards the status of minor children of a spouse by a previous marriage, illegitimate children, aged parents and dependent relatives. The solution perhaps might be to include within one's family all these persons who are completely dependent upon the immigrant and form part of the household. This is the basis on which immunity is allowed in respect of the family of a diplomatic agent under Article 37(1) of the 1961 Vienna Convention on Diplomatic Relations: 'The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State enjoy the privileges and immunities specified ....'"[279]

142. The presence of family members of an alien in the territory of a State may be a relevant factor to consider in deciding whether to expel and deport that alien. The notion of family has been considered in relation to migrant workers as follows:

> "Internal laws of the labour-importing countries generally do not distinguish between the families of natives and those of foreigners. Unfortunately, there is no universally acceptable concept of family. The meaning of a family for a migrant worker might be more

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[277] "Article 17 of the Covenant protects against unlawful or arbitrary interference with privacy and family. The notion of family is a broad one which has been interpreted as including 'all those comprising the family as understood in the society of the State party concerned'." Walter Kälin, "Limits to Expulsion under the International Covenant on Civil and Political Rights", *in* Salerno, Francesco (ed.), *Diritti dell'Uomo, Estradizione ed Espulsione*, CEDAM, Padua, Italy, 2003, pp. 143-164, at p. 152 (quoting Human Rights Committee, *General Comment No. 16[32,* 1988], *Article* 17, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, (UN Doc. HRI/GEN/1/Rev.7) at 21, para. 5).

[278] "The ECHR provides protection from deportation under certain circumstances. [...] The European Court must first find that there is a 'private and family life.' The category of family that can claim protection is broader than that under the CRC, since a minor child-parent relationship is not necessarily required. *Marckx* v. *Belgium,* 27 April 1979, Series A No. 31, for example, recognized the ties between near relatives such as grandparents and grandchildren as being included in family life. Same-sex relationships may also be protected, although under the rubric of private, rather than family life, X *and Y* v. *UK,* European Commission on Human Rights Admissibility Decision of 3 May 1983, Appl. No. 9369/81." Kate Jastram, "Family Unity" in Alexander T. Aleinikoff and V. Chetail (eds.), Migration and International Legal Norms, The Hague, T.M.C. Asser Press, 2003, pp. 185-201, p. 194 and n. 44.

[279] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, para. 8.01, p. 65. Commentary to Governing Rule 8 — Respect for Family Unity: "In the formulation and administration of its immigration laws, and of its laws and regulations relating to admission of aliens into its territory, a State shall respect the unity of the family". Ibid.

extensive than it is in the receiving countries. But 'family' is generally defined as the husband, his wife, and any minor children. There is, however, no agreement as to whether other dependents should be included within the concept of family."[280]

143. The concept of "family members" or related concepts are sometimes defined in international treaties for the purpose thereof. The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families provides a broad definition of "family" relying on the notion of "marriage" or any other relationship which produces "equivalent effects" under the applicable law. The Convention does not specify the gender of the married couple.

> "For the purposes of the present Convention the term 'members of the family' refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned."[281]

144. Article 5 of the Convention on the Rights of the Child defines the notion of family by reference to "local custom" and includes legal guardians:

> "States Parties shall respect the responsibilities, rights and duties of *parents or, where applicable, the members of the extended family or community as provided for by local custom*, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."[282] [Emphasis added.]

The same convention defines the term "child" as follows:

> "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."[283]

145. The national laws of several States define the family of an alien for purposes of immigration law, including expulsion and family reunification. A spouse is generally recognized as a member of

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[280] Tugrul Ansay, "Legal Problems of Migrant Workers", *Recueil des cours de l'Académie de droit international*, vol. III, tome 156, 1977, pp. 7-77, at p. 24 (citations omitted). For a discussion of legal issues relating to the family members of migrant workers, *see* pp. 29-55.

[281] International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, note 286 above, article 4, at p. 96.

[282] Convention on the Rights of the Child, New York, 20 November 1989, United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3, article 5.

[283] Ibid., article 1.

the family of an alien under national law.[284] Some laws include an "intended spouse"[285] or a "cohabitant".[286] A child is also generally recognized as a family member of an alien under national law.[287] The law may require that the child be a minor[288] under the age of sixteen,[289] seventeen,[290] eighteen[291] or twenty-one.[292] The law may further require that the minor child be unmarried[293] or legitimate.[294] The law may include a child who has been adopted or otherwise placed under the alien's care.[295] Some national laws recognize other dependents or relatives as members of the family of an alien, including a dependent (who may[296] or may not[297] be distinguished from a spouse), a parent, [298] a person who is in the alien's charge, [299] other near relatives,[300] or close family members.[301]

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[284] Australia, 1958 Act, articles 199(1)-(2), 205, and 211-12; Belarus, 1998 Law, articles 3 and 23; Bulgaria, 1998 Law at Additional Provisions, Sect. 1(1); Cameroon, 2000 Decree, article 17; Chile, 1975 Decree, article 32; Italy, 1998 Law No. 40, article 27; Nigeria, 1963 Act, articles 3(b)-(c) and 9(1)(c); Spain, 2000 Law, article 57(6); Sweden, 1989 Act, section 2.4; and United States, INA, sections 101(a)(35), 212(a)(2)(C)(ii) and (2)(H)(ii), (3)(B). The United States' legislation requires that the marriage either be contracted in the physical presence of both members, or consummated (United States, INA, section 101(a)(35)).

[285] United States, INA, section 101(a)(50).

[286] Sweden, 1989 Act, section 2.4.

[287] Nigeria, 1963 Act, article 9(3)(b); and United States, INA, section 212(a)(2)(C)(ii), (2)(H)(ii), and (3)(B).

[288] Bulgaria, 1998 Law at Additional Provisions, Sect. 1(1); Italy, 1998 Law No. 40, article 27; and Spain, 2000 Law, article 57(6).

[289] China, 1986 Rules, article 54; and Nigeria, 1963 Act, articles 18(1)(f)(ii) and 38, and 1963 Regulations (L.N. 94), article 23(a).

[290] United Kingdom, 1971 Act, section 3(6) (as amended by the Immigration and Asylum Act 1999).

[291] Australia, 1958 Act, article 5; Brazil, 1980 Law, article 7; Italy, 1998 Law No. 40, article 27; Russian Federation, 2002 Law No. 62-FZ, article 3; and Sweden, 1989 Act , section 2.4.

[292] United States, INA, section 101(b).

[293] United States, INA, section 101(b)-(c).

[294] Cameroon, 2000 Decree, article 17.

[295] Italy, 1998 Law No. 40, article 27; and United States, INA, section 101(b)-(c).

[296] Australia, 1958 Act, articles 199(2)-(3), 205, and 211-12; and Nigeria, 1963 Act, article 9(1)(c), (3)(c).

[297] Australia, 1958 Act, article 222(7)(a) and 223(11)(a); Canada, 2001 Act, article 39; Kenya, 1967 Act, article 3(1)(a), (l); and Nigeria, 1963 Act, articles 22(1), (3), 34 and 47.

[298] Spain, 2000 Law, article 57(6).

[299] Italy, 1998 Law No. 40, article 27.

[300] Belarus, 1998 Law, article 24; Italy, 1998 Law No. 40, article 27; and Sweden, 1989 Act, section 2.4.

[301] Ecuador, 2004 Law, article 12.

6. Refugee

146. The term "refugee" is generally understood as referring to a person who has been forced to leave his or her State of nationality or habitual residence in order to take refuge in another State.[302] The term "refugee" is to be distinguished from the term "internally displaced person" which generally refers to a person who is transferred within the territory of the same State, which is often the State of nationality.[303] It has been suggested that the term "refugee" is a term of art which has acquired a special meaning as a matter of international law.[304] It has also been suggested that the definition of the term "refugee" must be found in international legal instruments rather than customary international law.[305]

147. The definition of the term "refugee" varied in the international instruments that were adopted to address specific refugee problems during the time of the League of Nations.[306] Following the

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[302] "The term 'refugee' in the sociological sense has been used for centuries, whenever and for whatever reasons persons have been compelled to leave their homes and to seek refuge elsewhere; it is only in modern times, however, that the term has acquired legal significance. Thus the term has been used to define the competence, *ratione personae,* of international bodies dealing with refugee problems. It has likewise been used in international agreements relating to the status of persons who have had to leave their home States in order to take refuge in another country. Correspondingly, the term appears in national legislation regulating the status of refugees in a given country." Eberhard Jahn, "Refugees", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 72-76, at p. 72.

[303] "Although the term refugees is normally applied to uprooted people outside their country of origin, it is sometimes also used in referring to the so-called 'national refugees' or 'internally displaced persons', i.e. persons who are living in a refugee-like situation although they have remained within the internationally recognized borders of their country or who, having left their home country, have taken refuge in another country which grants them the same status as their own nationals. These "refugees" can evidently not be placed under international protection, but there may be a need for international assistance. Thus in various instances the General Assembly has requested UNHCR to extend humanitarian assistance in such situations." Eberhard Jahn, "Refugees", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 72-76, at p. 73. Internally displaced persons would be outside the scope of the present topic. *See* Part III.C.1(g).

[304] "International action and co-operation over the last sixty years have endowed the word 'refugee' with the status of a term of art." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 138-139.

[305] "The concept of 'refugee' is not one of customary international law. Consequently a definition of the term and of the status of refugees must be sought in international legal instruments. The main instruments are the Convention Relating to the Status of Refugees of 1951 (the 1951 Convention) and the Protocol Relating to the Status of Refugees of 1967 (the 1967 Protocol). The other instrument is the Statute of the Office of the United Nations High Commissioner for Refugees of 1951 (Statute of the U.N.H.C.R.)." Chooi Fong, note 108 above, p. 54 (citations omitted).

[306] "When under the auspices of the League of Nations a series of international bodies was created to deal with the refugees of that time and a number of agreements were concluded to regulate certain aspects of their legal status, the term "refugee" was defined each time in relation to a specific refugee problem. These legal definitions related to the national or ethnic origin of the group in question and the lack of protection afforded by the government of their country of origin." Eberhard Jahn, "Refugees", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 72-76, at p. 72 (examples omitted).

creation of the United Nations at the end of the Second World War, an attempt was made for the first time to provide a unified approach to the problem of refugees in general.

> "When the United Nations started to take action concerning refugees, there was general agreement that the refugee problem should be dealt with as a whole. Consequently the definition contained in the Constitution of the International Refugee Organisation, while referring to specific groups of pre-war and war-time refugees, included a general clause according to which the term 'refugee' was also to apply to persons outside their home State who could not or who, for valid reasons, were unwilling to avail themselves of the protection of that State. This latter clause foreshadowed the basic elements of the definition of the term 'refugee' included in the Statute of the office of the United Nations High Commissioner for Refugees ... and the Convention relating to the Status of Refugees of July 28, 1951 ... as extended by the Protocol relating to the Status of Refugees of January 31, 1967 ... Both definitions are very similar in terms and include any person who is outside the State of his nationality or, if he has no nationality, the country of his former habitual residence, owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion and is unable or, because of such fear, unwilling to avail himself of the protection of the government of the country of his nationality or, if he has no nationality, to return to the country of his former habitual residence."[307]

148. Article 1 (A) (2) of the Convention relating to the Status of Refugees defines the term "refugee"[308] as covering any individual who,

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[307] Eberhard Jahn, "Refugees", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 72-76, at p. 72 (citations omitted). "[T]he term 'refugee' also applies to a person ... who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the second world war, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality". Constitution of the International Refugee Organization, New York, 15 December 1946, United Nations, *Treaty Series*, vol. 18, No. 283, p. 3, at p. 18 Annex 1, Part I, Section A, 2. "A refugee is a person who is no longer under the protection of the State of his or her nationality, or in case of a stateless person the State of permanent residence, and has fled that State seeking refuge and assistance in another country ... This concept — loss of protection of one's state — has been at the heart of the refugee definition since its first use in the 1920's in the 'Nansen Agreements,' which protected only refugees from certain areas of Europe and the Middle East." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, para. 13.01, p. 99. "In treaties designed to secure the status of refugees and concluded in the inter-war years, the criterion generally adopted to distinguish the refugee was the fact of his not actually enjoying the protection of the government of his State of origin, whether or not he was 'legally' entitled to such protection." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 138-139.

[308] "This definition is now recognized on a worldwide basis, and is also the model for national legislation relating to refugee matters ..." Eberhard Jahn, "Refugees", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 72-76, at pp. 72-73.

> "[…] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[309]

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[309] Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150, Article 1. The text of this provision reads as follows:

"A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before I January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words 'events occurring before I January 1951' in article 1, section A, shall be understood to mean either (a) 'events occurring in Europe before I January 1951'; or (b) 'events occurring in Europe or elsewhere before I January 1951'; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

149. The Protocol relating to the Status of Refugees, adopted in 1967, removed temporal and geographical restrictions from the scope of application of the 1951 Convention, while keeping the same substantive definition of the term "refugee".[310]

150. The requirement of certain forms of persecution remains an important element of the definition of a refugee as a matter of conventional law. Consequently, the circumstances under which an individual has fled his or her country continue to be a relevant factor in determining whether a person qualifies as a refugee.

Provided that this paragraph shall not apply to a refugee falling under section A (I) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (I) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

[310] Protocol relating to the Status of Refugees, New York, 31 January 1967, United Nations, *Treaty Series*, vol. 606, No. 8791, p. 267, article I – General provision:

"1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term 'refugee' shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951 and ...' and the words... 'as a result of such events', in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (a) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol."

> "Apart from the basic questions of asylum for refugees and their non-deportation to the state of origin, attention has largely concentrated on their position in the state of asylum, the extent to which they may be internationally protected by that state, and the definition of those who may qualify as 'refugees' so as to benefit from the special provisions applicable to them... It is in particular sometimes necessary to distinguish between refugees from various forms of persecution and those seeking improvements in their material circumstances (so-called economic migrants): this distinction assumed importance in relation to the large migration from Vietnam, especially to Hong Kong, in 1988-89. Similarly a distinction must be drawn between refugees in the proper sense of the term and law-breakers (such as terrorists) seeking refuge from pursuit in a neighbouring state."[311]

151. The definition of refugees contained in the 1951 Convention and reiterated in the 1967 Protocol has been found to be too narrow in some respects to cover the problems faced by the international community with respect to victims who find themselves in similar situations as a result of events or circumstances other than those envisaged in the Convention.[312] The possibility of extending the notion of refugees was recognized when the Convention was adopted in 1951. State practice in relation to the mandate of the United Nations High Commissioner for Refugees indicates an awareness of the need to consider the notion of refugees in broader terms in order to address the needs of humanity as well as the international community.[313]

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[311] Robert Jennings and A. Watts, *Oppeinheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 892 and n.6 (referring to Basque terrorists seeking refuge in France) (citations omitted).

[312] "No generally accepted international instrument encompasses those millions of unfortunate persons who have fled massive human rights abuses, civil wars, external aggression, occupation, foreign domination, or events seriously disturbing public order. However, a few regional arrangements apply to such people. Also, where possible, the United Nations High Commissioner for Refugees (UNHCR), the principal United Nations operating agency responsible for protection and assistance to refugees, as well as various non-governmental organizations and *ad hoc* groups provide relief in these situations. Due to the growing refugee crisis and the perceived inadequacies of the existing international treaties relating to refugees, concepts such as 'temporary refugee' and 'temporary asylum' are emerging." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington, D.C., American Society of International Law, 1992, §13.01, p. 100. "The estimated number of refugees in the world ranges between eleven and twelve million. … The vast majority of refugees are, by contrast, unprotected under codified international law. They are 'humanitarian' refugees who seek shelter from conditions of general armed violence or natural disaster. The 1951 Refugee Convention, whose definition of 'refugee' is based on individual, political, religious, or racial persecution, is no longer relevant to the majority of refugees. The recent mass movements of persons fleeing civil war, military occupation, natural disasters, gross violations of human rights, or simply bad economic conditions, have emphasized the urgent need to reformulate the international legal regime which addresses the problems of refugees." Kay Hailbronner, "Non-Refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?", *Virginia Journal of International Law*, vol. 26, 1985-1986, pp. 857-896 (citations omitted).

[313] "On the global level, the practice of States *vis-à-vis* UNHCR, speaks emphatically of the international community's awareness of the need to extend refugee protection to larger groups of persons based upon their need rather than the technical cause of their flight." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, §13.02, p. 101.

> "From the beginning, the 1951 Convention was open for extension beyond its strictest terms. The 1951 Geneva Conference which adopted that Convention expressed at the same time the hope that 'all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.' The Statute of the Office of the United Nations High Commissioner which was adopted by the General Assembly of the United Nations in 1950, even before the Convention, is another source of the UNHCR powers, and those powers were increased continuously by subsequent resolutions of the General Assembly, which are usually adopted unanimously or by consensus. The refugees falling within the mandate of the High Commissioner, as interpreted by the General Assembly, are usually referred to as 'mandate refugees.' That mandate had, for instance, increased by 1957, when the General Assembly employed the concept of the High Commissioner's 'good offices' to allow UNHCR to provide protection and assistance to the refugees who did not meet the 1951 Convention definition. In 1965 the General Assembly authorized UNHCR to provide protection to non-Convention refugees on the same terms as Convention refugees; in 1975 it termed the situations of Convention and non-Convention refugees 'analogous' because both were victims of man-made events over which they had no control; and in 1985 the General Assembly urged all States to 'support the High Commissioner in his efforts to achieve durable solutions to the problem of refugees and displaced persons of concern to his office'.
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> "Other frequent statements by the General Assembly and UNHCR tend to evidence a merging of the concepts of 'refugee' and 'displaced person.' Approval by the international community of the continuous expansion of UNHCR's mandate by the General Assembly over many years and through many crises, coupled with the generous financial support for UNHCR's humanitarian work and requests by many States for UNHCR's expertise and assistance, indicate a widespread trend toward viewing this larger group as entitled to protection. However, for practical reasons, there is no effort to amend the definition of the Convention refugee by revising that Convention. States are willing to assist but unwilling to accept formally the obligation to do so."[314]

152. There have also been efforts to expand the notion of refugee at the regional level.[315] In 1969, the Organization of African Unity (OAU) adopted a broader definition of the term "refugee" in the Convention Governing the Specific Aspects of Refugee Problems in Africa.[316] According to this

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[314] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, §13.02, p. 102.

[315] "A number of regional refugee regimes have expanded the concept of "refugee" to include 'humanitarian refugee.'" Ibid.

[316] "The first step towards a more inclusive definition was taken in 1969 when the Organization of African Unity (OAU) adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa. The definition of 'refugee' used in the OAU Convention consists of two parts: a reiteration of the definition in the 1951 Convention and an additional part being Article 1(2): The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in

convention, the notion of "refugee" encompasses, in addition to the individuals already covered in the 1951 Convention,

> "[…] every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[317]

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either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." Ibid.

[317] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969, United Nations, *Treaty Series*, vol. 1001, No. 14691, p. 45, article 1– Definition of the term "Refugee":

"1. For the purposes of this Convention, the term 'refugee' shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

2. The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

3. In the case of a person who has several nationalities, the term 'a country of which he is a national' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of which he is a national if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

4. This Convention shall cease to apply to any refugee if: (a) he has voluntarily re-availed himself of the protection of the country of his nationality, or, (b) having lost his nationality, he has voluntarily reacquired it, or, (c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or, (d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or, (e) he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or, (f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or, (g) he has seriously infringed the purposes and objectives of this Convention.

5. The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity; (d) he has been guilty of acts contrary to the purposes and principles of the United Nations.

6. For the purposes of this Convention, the Contracting State of Asylum shall determine whether an applicant is a refugee."

153. The adoption of the broader definition of the term "refugee" by OAU at the regional level has influenced the meaning of this term at the international level.[318] By the early 1980s, the international community recognized the need to expand the notion of refugees similar to the OAU Convention in order to address the increasingly frequent situations involving large numbers of persons in circumstances similar to refugees who were not covered by the conventional definitions.

> "By 1981, the Executive Committee of the UNHCR Programme observed that the increased number of large-scale influx situations in different areas of the world, especially in developing countries, change the composition of the groups of asylum-seekers. Included are not only those within the meaning of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, but also those 'who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their country of origin or nationality are compelled to seek refuge outside that country.'" [319]

154. The Organization of American States (OAS) initially adopted a narrow approach to the notion of a refugee (or asylee) based on political offences or related common crimes in the 1969 American Convention on Human Rights, which provides in article 22, paragraph 7, as follows:

> "Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes."[320]

155. Following the adoption of the UNHCR statement in 1981, 10 Central American States adopted the Cartegena Declaration on Refugees of 1984, which recommended that the OAS Convention definition of "refugee" be expanded to include:

> "… persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive

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[318] "The need for a widening of the definition of refugee was particularly felt by the African States which, on September 10, 1969, concluded a Convention under the auspices of the Organization for African Unity governing the specific aspects of refugee problems in Africa… This African definition is now increasingly used outside the African continent to interpret the term 'refugees and displaced persons' as used by the UN General Assembly." Eberhard Jahn, "Refugees", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 72-76, at p. 73.

[319] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, §13.03, p. 103. *See* UNHCR, Executive Committee Conclusion No. 21 (XXXII) – 1981: General conclusion on international protection, 21 October 1981, para. 1.

[320] American Convention on Human Rights, "Pact of San José, Costa Rica", San José (Costa Rica), 22 November 1969, United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123; Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, §13.03, p. 103.

> violation of human rights or other circumstances which have seriously disturbed public order."[321]

156. The definition was subsequently endorsed by the Inter-American Commission on Human Rights as well as the OAS General Assembly.[322]

157. Nonetheless, it has been suggested that there is still no consensus as to the precise meaning of the term "refugee" as a matter of international law.[323] The "core meaning" as well as some "gray areas" concerning the definition of the term "refugee" have been described on the basis of State and international organization practice as follows:

> "Refugees within the mandate of UNHCR, and therefore eligible for protection and assistance by the international community, include not only those who can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain grounds (so-called 'statutory refugees'); but also other often large groups of persons who can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their State of origin (now often referred to as 'displaced persons' or 'persons of concern'). In each case, it is essential that the persons in question should have crossed an international frontier and that, in the case of the latter group, the reasons for flight should be traceable to conflicts, or radical political, social, or economic changes in their own country. With fundamental human rights at issue, the key remains violence, or the risk or threat of violence, but only in certain cases; those who move because of pure economic motivation, pure personal convenience or criminal intent are excluded.
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> …
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> "On the basis of State and international organization practice, the above core of meaning represents the content of the term 'refugee' in general international law. Grey areas

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[321] Cartagena Declaration on Refugees, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc., OEA/Ser.L/V/II.66/doc.10, rev. 1, 1984-85, pp. 190-93, para. 3.

[322] "Although the Cartagena Declaration was not considered originally as binding on States, it not only expressed the sentiment of ten Central American official delegations that the classic definition had failed to meet modern refugee needs, but also received the full support of the Inter-American Commission on Human Rights. Consequently, the OAS General Assembly recommended that Member States apply the Declaration in dealing with asylum-seekers in their territory." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, §13.03, p. 103.

[323] "There is as yet no consensus on the definition of 'refugee', although treaties and State practice contribute to an understanding of the term. For present purposes we may define a refugee as a person outside his country of nationality who is seeking or has received asylum in a foreign country as a means of protection against persecution in his own… A refugee so defined is an alien of a special kind, since he or she is unwilling or unable to return to his or her country of nationality." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 393 (citations omitted).

> nevertheless remain. The class of persons 'without, or unable to avail themselves of, the protection of the government of their State of origin' begs many questions. Moreover, the varying content of the term 'refugee' may likewise import varying legal consequences, so that the obligations of States in matters such as *non-refoulement*, non-rejection at the frontier, temporary refuge or asylum, and treatment after entry will depend upon the precise status of the particular class."[324]

158. The determination of an individual's status as a refugee may also be complicated by political considerations because of the persecution element of the definition of a refugee.[325] Similarly, UNHCR may be hesitant to characterize a group of persons as "refugees" because of the political implications.

> "The High Commissioner has often refrained from making collective determinations of groups of people as refugees by resorting to the use of terms such as 'persons in situations analogous to refugees' and 'displaced persons'. This is because it is thought impolitic to classify persons as refugees, for such a determination necessarily implies that the country from which the refugees have fled is a country of persecution."[326]

159. The term "refugee" is also defined in the national laws of a number of States. The definitions contained in national legislation are often influenced by conventional definitions, particularly to the extent that these laws constitute implementing legislation for the relevant convention.[327] The broader notion of refugees adopted at the international and regional level is reflected in the national laws of some States.[328]

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[324] Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Oxford, Clarendon Press, 1996, pp. 29-30 (citation omitted).

[325] "Political considerations must play a part in the actual determination of the status of persons as refugees because the concept of 'persecution' is difficult to apply objectively." Chooi Fong, note 108 above, p. 106.

[326] Ibid.

[327] Eberhard Jahn, "Refugees", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 72-76, at pp. 72-73.

[328] "State practice has also demonstrated support for a broader concept of 'refugee.' Many States admit refugees fleeing from conditions other than persecution, either by statute or simply on an *ad hoc* basis. For instance, in the 1991 report to the U.N. General Assembly, the United Nations High Commissioner for Refugees noted, in relation to the definition of 'refugee': [D]uring the period under review the Mexican Government passed internal asylum legislation recognizing the status of "refugees; the meaning given to the term 'refugee' being that contained in the Cartagena Declaration, already applied on a de facto basis to asylum seekers in the region by many Latin American countries. This protection takes the form of temporary or, less often, permanent refuge or political asylum." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, §13.03, pp. 103-104 (paragraph indentation omitted). For example, Sweden may confer refugee status on persons fleeing an environmental disaster or persecution arising from the alien's sex or homosexuality (Sweden, 1989 Act, section 3.3), and the United States may grant refugee status to those who have been threatened with or subjected to abortion or involuntary sterilization (United States, INA, section 101(a)(42)).

7. Displaced person

160. There are other categories of persons who may find themselves in situations similar to refugees, but who would not fall within the definition of refugees strictly speaking, including "displaced persons"[329] and "environmental refugees".

161. The term "displaced person" may be used in a general sense to refer to a person who flees his or her State for reasons other than the forms of persecution specified in the conventional definitions of a refugee.

> "Persons who flee their State due to persecution, or a well-founded fear of being persecuted, for reasons of race, religion, nationality, membership of a particular social group, or political opinion, are generally referred to as 'Convention refugees,' who are entitled to protection under the 1951 Convention Relating to the Status of Refugees, or the 1967 Protocol Relating to the Status of Refugees…Persons who flee but not for the reasons stated above are generally referred to as 'displaced persons' (if they have left the territory of the country of danger) or 'internally displaced persons' (if they have not left the territory)."[330]

162. The term "displaced person" may also be used in a more limited sense to refer to "victims of man-made disasters who find themselves in a refugee-like situation outside their home countries."[331] In some cases, the General Assembly of the United Nations has extended the mandate of UNHCR to cover such persons.

> "The definitions in the UNHCR Statute and in the refugee instruments of 1951 and 1967 were primarily conceived from the point of view of regulating the status of refugees and of arranging for their international protection. It was soon felt by the international community, however, that international action for refugees, and in particular humanitarian assistance, must be extended in refugee situations wherever they occur and independently of whether or not the

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[329] "In particular, the Convention definition excludes most of the world's displaced population who are in need of some level of protection." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, §13.01, p. 101 (referring to the 1951 Convention Relating to the Status of Refugees). "In addition to these attempts to resolve the problems caused by statelessness, attempts have been made to mitigate the lot of particular categories of stateless persons or persons whose position is analogous to statelessness. These attempts have primarily been concerned with displaced persons or refugees who, where they are not stateless, are in virtually the same position, in that the state whose nationality they possess is unlikely to afford them any protection or otherwise provide them with the benefits which normally flow from the possession of a nationality." Robert Jennings and A. Watts, *Oppeinheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 890-891 (citations omitted).

[330] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, §13.01, pp. 99-100.

[331] Eberhard Jahn, "Refugees", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 72-76, at p. 73.

> group concerned, or every single member of that group are refugees *stricto sensu*. Consequently, in a large number of resolutions the United Nations General Assembly has enabled the UNHCR to use his good offices in refugee situations not falling strictly within his mandate. In dealing with the activities of UNHCR, the General Assembly has since 1977 generally referred to 'refugees and displaced persons', the latter term meaning victims of man-made disasters who find themselves in a refugee-like situation outside their home countries."[332]

163. The term "environmental refugee" may be used to refer to victims of environmental conditions who find themselves in a refugee-like situation outside their home countries. Although persons displaced by environmental conditions represent a growing problem for the international community, international law has yet to confer refugee status on victims of environmental conditions.[333]

8. Asylee

164. The term "asylee" is generally understood as referring to a person who has been granted territorial asylum or diplomatic asylum.[334] Such a person may or may not qualify as a refugee.[335]

> "Asylum accorded by a State to persons in its territory is generally referred to as territorial asylum. Asylum accorded in other places, most notably on the premises of an

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[332] Eberhard Jahn, "Refugees", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 72-76, at p. 73.

[333] "Rising sea levels, desertification and shrinking freshwater supplies will create up to 50 million environmental refugees by the end of the decade, experts warn today. Janos Bogardi, director of the Institute for Environment and Human Security at the United Nations University in Bonn, said creeping environmental deterioration already displaced up to 10 million people a year, and the situation would get worse.

"There are well-founded fears that the number of people fleeing untenable environmental conditions may grow exponentially as the world experiences the effects of climate change," Dr Bogardi said. "This new category of refugee needs to find a place in international agreements. We need to better anticipate support requirements, similar to those of people fleeing other unviable situations."

"The Red Cross says environmental disasters already displace more people than war. Such people are currently not recognised under international agreements as refugees, Dr Bogardi said, so are denied access to assistance received by victims of violence or political persecution." David Adam, 50m environmental refugees by end of decade, UN warns, *The Guardian*, London, 12 October 2005, *available in* United Nations DPI News Monitoring.

[334] Diplomatic or extraterritorial asylum has been discussed previously in relation to the notion of the presence of an alien in the territory of another State. *See* Part III.B.3(a).

[335] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, §13.01, p. 99. "In the past few years, persecution on the basis of gender or gender-linked practices has been advanced as the basis for claims of asylum." Anne M. Trebilcock, "Sex Discrimination", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 390-396, at p. 395.

embassy or a legation, is referred to as extraterritorial or, more particularly, diplomatic asylum … A person enjoying asylum may be referred to as an 'asylee'. He may or may not be a refugee in accordance with an accepted definition in international or municipal law."[336]

165. The *Institut de Droit international* provided a definition of the term "asylum" which does not mention the reasons for which the individual seeks protection:

> "In the present Resolutions, the term "asylum" indicates the protection which a State grants, in its territory or in another place in which certain organs of that State exercise their competences, to an individual who has come to seek it."[337]

166. Similarly, the Draft Convention on Territorial Asylum produced by the International Law Association in 1952 draws a distinction between the notions of "asylum" and "refuge". The former is given a broader meaning than the latter. In fact, with respect to "asylum" reference is made to "persecution" with no specification of the grounds thereof.[338]

167. The Universal Declaration of Human Rights uses the term "asylum" to refer to situations where an individual seeks protection from persecution without specifying any particular grounds and specifically excluding only situations involving prosecutions for non-political crimes or acts contrary to the purposes and principles of the United Nations. Article 14 provides:

> "1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

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[336] Atle Grahl-Madsen, "Territorial Asylum", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 283-287, at pp. 283-284.

[337] Institut de Droit international, L'asile en droit international public (à l'exclusion de l'asile neutre), *Annuaire de l'Institut de Droit international*, vol. 43-II, 1950, session de Bath, 11 septembre 1950, p. 375 [French original]. However, attention may be drawn to the preamble of the resolution, which refers to "political reasons", "Considering in particular that the mass exodus of individuals who are forced for political reasons to leave their country imposes upon states the duty to combine their efforts in order to do what is required to provide for the needs of the situations …" as well as article 2 of the resolution, dealing with territorial asylum, which characterizes the granting of asylum as the accomplishment of States' "humanitarian duties", "A State which in the accomplishment of its humanitarian duties, grants asylum in its territory does not face international responsibility. […] 3. When political events cause in a State an exodus of people, the other States shall consult each other on the most efficient means to assist these people, by having recourse, if necessary, to an international body on the most equitable way of distributing these people amongst their territories and, in general, on the measures to be taken with a view to fulfilling their humanitarian duties." [French original.]

[338] International Law Association, Committee on the Legal Aspects of the Problem of Asylum, Report and draft conventions on diplomatic and territorial asylum, *Conference Report 1972*, pp. 196-211, Draft Convention on Territorial Asylum, p. 207. Article 1 (a), dealing with asylum, provides: "All States have a right to grant asylum to all victims of or have well-grounded fear of persecution and to political offenders". Article 1 (b), dealing with refugees, provides: "The High Contracting Parties undertake to grant refuge in their territories to all those who are seeking asylum from persecution on grounds of race, religion, nationality, membership of a particular social group, which shall be understood to include any regional or linguistic group, or adherence to a particular political opinion. […]."

> 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."[339]

168. Thus, the Universal Declaration uses the term "asylum" in a broader sense than the term "refugee status" as used in the Convention relating to the Status of Refugees.

169. The Declaration on Territorial Asylum was adopted by the General Assembly of the United Nations in 1967.[340] The Declaration refers to article 14 of the Universal Declaration on Human Rights, includes persons struggling against colonialism and excludes persons suspected of committing crimes against peace, war crimes or crimes against humanity.

170. Other instruments provide some indication of the possible grounds for persecution for purposes of asylum. The Convention on Territorial Asylum, concluded in Caracas on 28 March 1954, refers to persecution based on beliefs, opinions, political affiliations as well as political offences.[341] The American Convention on Human Rights recognizes the right to seek and be granted asylum in case of persecution for political offenses or related common crimes.[342]

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[339] General Assembly resolution 217 (III), International Bill of Human Rights: Universal Declaration of Human Rights, 10 December 1948, article 14.

[340] General Assembly, resolution 2312 (XXII), Declaration on Territorial Asylum, 14 December 1967. Article 1 of this resolutions states: "1. Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States. 2. The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes. 3. It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."

[341] Convention on Territorial Asylum, Caracas, 28 March 1954, United Nations, *Treaty Series*, vol. 1438, No. 24378, p. 127. Article II of this convention provides:

> "The respect which, according to international law, is due the Jurisdictional right of each State over the inhabitants in its territory, is equally due, without any restriction whatsoever, to that which it has over persons who enter it proceeding from a *State in which they are persecuted for their beliefs, opinions, or political affiliations, or for acts which may be considered as political offenses.*
>
> "Any violation of sovereignty that consists of acts committed by a government or its agents in another State against the life or security of an individual, carried out on the territory of another State, may not be considered attenuated because the persecution began outside its boundaries or is due to political considerations or reasons of state." [Emphasis added.]

[342] American Convention on Human Rights, "Pact of San José, Costa Rica", San José (Costa Rica), 22 November 1969, United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123, article 22, para 7: "Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes."

171. The notion of asylum is referred to and defined in national legislation.[343] The national laws of some States use the notions of "refugee" and "asylee" interchangeably.[344] The national laws of other States use the term "asylum" in a broader sense to encompass more than just "refugees".[345]

9. Asylum seeker

172. The term "asylum seeker" is generally understood as referring to a person who has requested but not yet been granted asylum. Such persons may be seeking protection either as a refugee or as an asylee. The term "asylum-seeker" is used and defined in the legislation of some States.[346]

10. Stateless person

173. The term "stateless person" is generally understood as referring to a person who does not have the nationality of any State. While this term, narrowly construed, refers to a person who does not have a nationality by virtue of the application of the relevant national law of the State concerned, it may also be construed more broadly to include a person who has a nationality but does not enjoy the protection of his or her Government.[347] A person may become stateless by reason of not acquiring a

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[343] For example, according to Chile's legislation, political asylum may be granted to those aliens who have been forced to leave their State and enter Chile in an irregular manner, or who cannot return to their State (Chile, 1975 Decree, articles 35-36). Some States grant asylum status to persecuted political figures or other persons fleeing political persecution (Chile, 1975 Decree, articles 34 and 34*bis*; Ecuador, 2004 Law, article 4; Guatemala, 1986 Decree Law, article 22; Honduras, 2003 Act, article 52; and Peru, 2002 Law, article 4).

[344] For example, in Bosnia and Herzegovina, Finland and Sweden, asylum is expressly granted to refugees (Bosnia and Herzegovina, 2003 Law, article 72; Finland, 2004 Act, sections 2(11)-(14), 87 and 106; and Sweden, 1989 Act, section 3.1), and in Finland refugee status is given to those granted asylum (Finland, 2004 Act, section 106).

[345] For example, Sweden's legislation enumerates a list of eligibility grounds for protected status apart from those applied to potential refugees (Sweden, 1989 Act, section 3.3) and equates a request for a residency permit by an alien seeking protected status with an application for asylum (1989 Act, section 3.1). The United Kingdom's legislation defines an asylum-seeker as an alien intending to claim that the State would violate its obligations under the Convention relative to the Status of Refugees or the European Convention on Human Rights by removing the alien from the United Kingdom (1971 Act, section 25(A) (as amended by the Nationality, Immigration and Asylum Act 2002)).

[346] The legislation of Bosnia and Herzegovina defines an asylum seeker as any person seeking asylum either upon or after entry (Bosnia and Herzegovina, 2003 Law, article 4(e)). Lithuania's legislation defines an asylum-seeker as an alien who has lodged an asylum application according to the procedure established by its law (Lithuania, 2004 Law, article 2(20)). See also Sweden, 1989 Act, section 3.1, which equates a residency permit request by an alien seeking protected status as an asylum application; and the United Kingdom, 1971 Act, section 25(A) (as amended by the Nationality, Immigration and Asylum Act 2002), which defines an asylum seeker as an alien intending to claim that the alien's removal would cause the U.K. to violate its relevant Convention obligations.

[347] Hans Von Mangoldt, "Stateless Persons", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 656-660, at p. 656.

nationality at birth or subsequently by losing or being deprived of the nationality of a State without acquiring the nationality of another State.[348]

174. The Convention relating to the Status of Stateless Persons defines the term "stateless person" as "a person who is not considered as a national by any State under the operation of its law". The Convention does not, however, apply to the following categories of persons: (1) persons receiving protection or assistance from organs or agencies of the United Nations other than the Office of the United Nations High Commissioner for Refugees; (2) persons who have been recognized by the authorities of their country of residence as possessing the same rights and obligations as its nationals; and (3) persons who are suspected of having committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside their country of residence prior to their admission to that country or acts contrary to the purposes and principles of the United Nations.[349]

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[348] "An individual may be without nationality knowingly or unknowingly, intentionally or through no fault of his own. Even by birth a person may be stateless, as where an illegitimate child is born in a state which does not apply *ius soli* to an alien mother under whose national law the child does not acquire her nationality, or where a legitimate child is born in such a state to parents who have no nationality themselves. Statelessness may occur after birth, for instance as the result of deprivation or loss of nationality by way of penalty or otherwise. All individuals who have lost their original nationality without having acquired another are, in fact, stateless." Robert Jennings and A. Watts, *Oppeinheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 886-890, at p. 886 (citations omitted).

[349] Convention relating to the Status of Stateless Persons, New York, 28 September 1954, United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117, article 1 – Definition of the term "stateless person":

"1. For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.

2. This Convention shall not apply:

(i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;

(ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;

(iii) To persons with respect to whom there are serious reasons for considering that:

(a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

(b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;

(c) They have been guilty of acts contrary to the purposes and principles of the United Nations."

175. The term "stateless person"[350] or "person without citizenship"[351] appears in the national laws of various States. Both terms are used to refer to the notion of a non-citizen of the State who does not hold evidence of the citizenship of any other State.[352] The term "stateless person" may be defined more specifically as (1) a person who is not considered a national of any State pursuant to its own law;[353] or (2) a person who is without nationality or known nationality.[354] States may further define or restrict the notion of a stateless person.[355]

11. Former national

176. The term "former national" is generally understood as referring to a person who is no longer considered to be a national of his or her previous State of nationality. If this person did not have another nationality (dual or multiple nationals) and has not acquired a new nationality, he or she may also fall under the category of stateless persons. The deprivation of nationality refers to the compulsory withdrawal of the nationality of an individual by the unilateral act of a State in contrast to a change in nationality as a result of voluntary action on the part of the individual.[356] Sometimes different terms are used to distinguish between the deprivation of nationality acquired by birth (denationalization) and the deprivation or cancellation of nationality acquired by naturalization (denaturalization).

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[350] Bosnia and Herzegovina, 2003 Law, article 4(b); Guatemala, 1986 Decree Law, article 24; Honduras, 2003 Act, articles 3(2) and 54; Madagascar, 1994 Decree, articles 8 and 43; Russian Federation, 2002 Law No. 115-FZ, article 2, and 2002 Law No. 62-FZ, article 2; and Slovenia, 2003 Act, article 7.

[351] Belarus, 1998 Law, article 3; and Bulgaria, 1998 Law, article 2(2). Bulgaria defines this term as a person not considered the citizen of any State and who has an official document certifying this quality.

[352] Belarus, 1998 Law, article 3; Bosnia and Herzegovina, 2003 Law, article 4(b); and Russian Federation, 2002 Law No. 115-FZ, article 2, and 2002 Law No. 62-FZ, article 2.

[353] Guatemala, 1986 Decree Law, article 24; Honduras, 2003 Act, article 3(2); Madagascar, 1994 Decree, article 8; and Slovenia, 2003 Act, article 7.

[354] Madagascar, 1994 Decree, article 8; and Tunisia, 1968 Law, article 1.

[355] The Russian Federation specifies that a stateless person is a natural person (Russian Federation, 2002 Law No. 62-FZ, article 2). Honduras does not confer statelessness status on infant aliens since they acquire Honduran nationality pursuant to its Constitution (Honduras, 2003 Act, article 54).

[356] "[T]he term denationalization is used to signify all deprivations of nationality by a unilateral act of a State, whether by the decision of administrative authorities or by the operation of law. In this sense, denationalization thus does not concern the legal problems connected either with renunciation of nationality, i.e. expatriation or loss of nationality resulting from a deliberate renunciation by the individual, or with substitution of nationality, i.e. automatic loss of nationality upon acquisition of another nationality." Rainer Hofmann, "Denationalization and forced exile", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, at p. 1001.

12. Enemy alien

177. The term "enemy alien" may be understood as referring to the nationals of the opposing States parties to an armed conflict.[357]

B. Expulsion and deportation

178. As discussed previously, it may be useful to distinguish between two distinct aspects of the expulsion of aliens, namely, (1) the decision or order which provides the legal authority for the compulsory departure of the alien; and (2) the enforcement measures that may be used to implement such an order or decision in terms of the physical removal of the alien from the territory. As also discussed previously, there are different views concerning this approach due to the absence of general agreement concerning the notions of expulsion and deportation.[358]

1. Expulsion

179. The term "expulsion" may be understood as referring to the order or decision of the competent national authority requiring an alien whose presence is contrary to the interests of the State to leave its territory.[359] This approach is consistent with a study on statelessness prepared by the Secretariat in 1949 which used the term "expulsion" to refer to "the juridical decision taken by the judicial or administrative authorities whereby an individual is ordered to leave the territory of the country".[360]

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[357] "The outbreak of war makes alien enemies of the respective subjects of the belligerents. … With the progress of civilization, there is an increasing tendency to confine the effects of an armed conflict within as narrow limits as possible and to mitigate the rigorous maintenance of the principle that subjects of an enemy state may be treated as enemies, in favor of the unarmed civilian alien, whose person and property are respected, with certain variously stated exceptions, as before the war." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, § 32, pp. 61-62.

[358] "Expulsion is not a technical term, and is often used interchangeably with 'deportation': both involve the removal of a person from a state by its unilateral act, as distinct from extradition (which involves agreement and a degree of cooperation between the two states concerned)." Robert Jennings and A. Watts, *Oppeinheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 940, n.1.

[359] Expulsion has been defined in the following terms: "Act by which the competent authority of a state orders or forces one or more individuals who find themselves in the territory of that state to leave that territory in a short period of time or immediately also forbidding them to re-enter that territory." [French original.] "Expulsion is the act by which a state orders and, if necessary, forces one or more individuals who find themselves in its territory, to leave that territory in a short period of time." [French original.] See *Dictionnaire de la terminologie du droit international*, publié sous le patronage de l'Union Académique Internationale, Paris, Sirey, 1960, pp. 279-280 ; Charles De Boeck, "L'expulsion et les difficultés internationales qu'en soulève la pratique", *Recueil des cours de l'Académie de droit international*, vol. 18, 1927-III, pp. 447-646, at p. 447.

[360] United Nations Secretariat, *A Study on Statelessness*, Lake Success – New York, August 1949, doc. E/112, section III, chapter 1(1)(J).

180. Similarly, the *Glossary on Migration* prepared by the International Organization for Migration defines the term "expulsion" as:

> "The act by an authority of the State with the intention and with the effect of securing the removal of a persons or persons (aliens or stateless persons) against their will from the territory of that State."[361]

The *Glossary on Migration* also defines the term "expulsion order" as follows:

> "The order of a State informing of the prohibition of a non-national to remain on its territory. This order is given either if the individual entered illegally on the territory, or is no longer authorized to remain in the State. This order is generally combined with the announcement that it will be enforced, if necessary, be deportation."[362]

181. The term "expulsion" is used in the national laws of some States. The national laws may use the term "deportation" rather than the term "expulsion" to refer to the relevant order or decision to expel an alien.[363] National laws may also refer to other types of decisions or orders compelling an alien to leave the territory of the State which are not specifically referred to as "expulsion".[364] National laws may further provide for a denial of re-entry for either a specified[365] or an unspecified period.[366]

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[361] *Glossary on Migration*, Geneva, International Organization for Migration, 2004, p. 22.

[362] Ibid.

[363] See Belarus, 1998 Law, article 28, and 1993 Law, article 25; Brazil, 1980 Law, articles 57 and 61; Finland, 2004 Act, section 143; Honduras, 2003 Act, articles 3(5)-(6); and Russian Federation, 2002 Law No. 115-FZ, article 2, and 1996 Law, article 25.10.

[364] The relevant decision or order may take the form of: (1) an instruction to leave the State's territory (Bosnia and Herzegovina, 2003 Law, article 56(1) and (3)); (2) compulsory removal of the foreigner from the State's territory (Belarus, 1999 Council Decision, articles 2-3; Bulgaria, 1998 Law at Additional Provisions, section 1(4); Finland, 2004 Act, section 143; Honduras, 2003 Act, article 3(5); Italy, 1996 Decree Law No. 132, article 7(3); Kenya, 1967 Act, article 8(1); Lithuania, 2004 Law, article 2(8); Madagascar, 1994 Decree, article 33; and Russian Federation, 2002 Law No. 115-FZ, article 2); (3) cancellation of a visa or transit permit (Belarus, 1999 Council Decision, article 5; and Iran, 1931 Act, article 11); or (4) cancellation of a residence or stay permit, or of other leave to remain in the territory (Argentina, 2004 Act, article 63; Belarus, 1999 Council Decision, article 5; Czech Republic, 1999 Act, section 118; Honduras, 2003 Act, article 3(6); Iran, 1931 Act, article 11; and Paraguay, 1996 Law, article 39).

[365] Argentina, 2004 Act, article 63; Belarus, 1999 Council Decision, article 7, and 1998 Law, article 29; Bosnia and Herzegovina, 2003 Law, article 56(1) and (3); Czech Republic, 1999 Act, section 118; Hungary, 2001 Act, article 44; Italy, 1996 Decree Law No. 132, article 7(3); Nigeria, 1963 Act, article 21(1); and Portugal, 1998 Decree-Law, articles 105, 126 and 126(A). Portugal imposes a specified period of prohibition on re-entry when an alien potentially liable to expulsion voluntarily consents to leave the State (Portugal, 2003 Decree-Law, article 126).

[366] Italy, 1998 Law No. 40, article 11(13), and Kenya, 1967 Act, article 8(1).

2. Deportation

182. The term "deportation" has not been used in a uniform sense at the international level.[367] In some instances, the term "deportation" has been used to designate the act, whether or not based on an expulsion order, of removing an alien from the territory of a State.[368] In other instances, the terms "expulsion" and "deportation" have been used interchangeably.[369]

183. The similar lack of uniformity in the use of the term "deportation" in the national laws of States is therefore not surprising. In some instances, the term is used to designate the forcible or escorted removal of an alien from the territory of the State.[370] In other instances, the term is used to designate the decision or order requesting an alien to leave the State's territory, usually within a specified period.[371]

184. The term "deportation" is used for present purposes to refer to the compulsory measures that may be used by the competent national authority to implement the expulsion decision.[372] This

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[367] "In traditional international law, a distinction was drawn between the power of a State to deport an alien and the power to expel an alien. Deportation meant that the alien could be forcibly sent to any State chosen by the deporting State while expulsion meant that the alien could be ejected from the territory without the expelling State stipulating a particular destination. Although the technical difference between the two procedures still remains, deportation and expulsion are often treated in modern practice as being interchangeable terms." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, § 12.03, p. 90.

[368] See *Glossary on Migration*, Geneva, International Organization for Migration, 2004, p. 18, which defines "deportation" as "the act of a State in the exercise of its sovereignty in removing an alien from its territory to a certain place after refusal of admission or termination of permission to remain."

[369] See, for example, Principles concerning admission and treatment of aliens (adopted by the Asian-African Legal Consultative Committee at its fourth session), reproduced in *Yearbook of the International Law Commission*, 1961, vol. II, A/CN.4/139, article 16, para. 1 ("A State shall have the right to order expulsion or deportation of an undesirable alien in accordance with its local laws, regulations and orders") and para. 3 ("If an alien under orders of expulsion or deportation fails to leave the State within the time allowed, or, after leaving the State, returns to the State without its permission, he may be expelled or deported by force, besides being subjected to arrest, detention and punishment in accordance with local laws, regulations and orders."). See also *Mohamed and Another*, note 221 above, pp. 469-500 ("Deportation is essentially a unilateral act of the deporting State in order to get rid of an undesired alien.").

[370] Belarus, 1999 Council Decision, article 2, and 1998 Law, article 3; Brazil, 1981 Decree, article 98, and 1980 Law, articles 57 and 61; Hungary, 2001 Act, article 4(1); Iran, 1931 Act, article 11; Paraguay, 1996 Law, article 80; Russian Federation, 2002 Law No. 115-FZ, articles 2 and 31; and South Africa, 2002 Act, article 1(1)(xii).

[371] Nigeria, 1963 Act, article 21; Republic of Korea, 1992 Act, articles 67-68; and Spain, 2000 Law, article 28(3).

[372] *See* Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112. "Deportation is a mere manifestation of domestic policy marking the effort of a state to cause the removal from its domain of one who has unlawfully entered or remained therein." S.K. Agrawala, *International Law Indian Courts and Legislature*, Bombay, N.M. Tripathi Private Ltd., 1965, p. 186. This definition is also consistent with the position adopted by

approach is used in order to facilitate the consideration of the substantive and procedural requirements that may apply to the expulsion proceedings and those that may apply to the implementation of the decision to expel an alien. There is also the possibility that the implementation of the decision to expel an alien may be achieved by means of voluntary departure, which obviates the need for compulsory measures such as deportation to implement the decision.[373]

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the Supreme Court of the United States, that "'[d]eportation' means the moving of someone away from the United States, after his exclusion or expulsion." *Kwong Hai Chew v. Colding et al.*, United States, Supreme Court, 9 February 1953, 345 U. S. 229; 97 L.Ed. 972; 73 Sup. Ct. 603, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 343-357 (footnote 1 in ILR). However, the legislation of some States (Belarus, 1998 Law, article 3; and Paraguay, 1996 Law, article 80) uses the term "expulsion" to describe the notion of "deportation" as understood here.

[373] *See* Part IX.A.

V. THE RIGHT OF A STATE TO EXPEL ALIENS FROM ITS TERRITORY

A. The inherent nature of the right of expulsion

185. The right[374] of a State to expel an alien from its territory when the continuing presence of this individual is contrary to the interests of the State is well established as a matter of international law.[375] The right of expulsion has been characterized as an inherent attribute of the sovereignty of every State.[376] As early as 1892, the Institut de Droit international expressed the view that "for each State

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[374] Different terms have been used to describe the nature of the ability of a State to expel aliens. "States have the 'right', or 'power' or 'competence' to expel aliens." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 208. It may be necessary for the Commission to consider which term best describes the nature of the ability of a State to expel aliens as it is presently understood. The terms "power" or "competence" appear to have been used more frequently in the nineteenth and the first part of the twentieth centuries when the ability of a State to expel aliens was considered to be virtually unlimited. The term "right" appears to have been used more frequently since the middle of the twentieth century in connection with efforts to recognize substantive and procedural limitations on the ability of a State to expel aliens.

[375] "All States reserve their right to expel the aliens whose stay in their territory constitutes a threat to public order." Patrick Dailler and Alain Pellet, *Droit international public*, Paris, L.G.D.J., 1999, p. 664 [French original]. "The right of states to expel aliens is generally recognised. It matters not whether the alien is only on a temporary visit, or has settled down for professional business or other purposes on its territory, having established his domicile there." Robert Jennings and A. Watts, *Oppeinheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 940 (citations omitted) (referring to *Attorney-General for Canada v. Cain* [1906] AC 542; the decision of the US Supreme Court in *Harisiades v. Shaughnessy*, ILR, 19 (1952), No 69; and the decision of the Supreme Court of Burma in *Karam Singh v. Controller of Immigration* (1956), ILR, 28, p. 311). "There is no dissent from the proposition that every state possesses the power of expulsion, as the corollary to its right to determine the conditions for entry upon its territory." Lawrence Preuss, "International Law and Deprivation of Nationality", *Georgetown Law Journal*, vol. 23, 1934, pp. 250-276, at p. 272. "That a State has in general the right to expel aliens from its territory is not in doubt. The right has long been acknowledged ..." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 459 (citations omitted) (referring in part to *Musgrove v. Chun Teeong Toy*, [1891] A.C. 272, and *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892)).

[376] "The power to expel aliens rests upon the same foundation and is justified by the same reasons as the power to exclude, namely: the sovereignty of the state, its right of self-preservation, and its public interests." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 48. "The right of a state to expel, at will, aliens, whose presence is regarded as undesirable, is, like the right to refuse admission of aliens, considered as an attribute of the sovereignty of the state, and is not limited even by treaties which guarantee the right of residence to the nationals of other contracting states *(Fong Yue Ting* v. *U.S.*, 149, U.S. 698 (1892))." Shigeru Oda, "The Individual in International Law", *in* Max Sørensen (dir.) *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 469-530, at p. 482. "The competence to expel is usually accepted by States, by international tribunals, and by writers as the necessary concomitant of the State's powers in regard to the admission and exclusion of aliens. It is frequently justified by reference to the public interests of the State and as an incident of sovereignty." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 203 (citations omitted). "A state is under no duty, in the absence of treaty obligations, to admit aliens to its territory. If it does admit them, it may do so on such terms and conditions as may be deemed by it to be consonant with its national interests. Likewise a state may deport from its territory aliens whose presence therein may be regarded by it as undesirable. These are incidents of sovereignty." Green Haywood Hackworth, *Digest of*

the right to admit or refuse to admit aliens into its territory or to admit them conditionally or to expel them is a logical and necessary consequence of its sovereignty and independence".[377]

186. Several international treaties contain provisions regulating the expulsion of aliens from a procedural or substantive point of view, thus confirming the existence of such a right.[378] Moreover, there are numerous instances of international, regional and national practice, some of which are mentioned in the present section, supporting the existence of the right of a State to expel aliens.

187. The right of expulsion has been recognized in a number of international arbitral awards and claims commission decisions.[379] The inherent nature of the right of expulsion as an incident of State sovereignty was affirmed in a decision adopted by the Mixed Claims Commission Netherlands-Venezuela in the *Maal Case.* The Umpire characterized the right of expulsion as "one of the attributes of sovereignty" and stressed its defensive function: "the right [of expulsion] is inherent in all sovereign powers and is one of the attributes of sovereignty, since it exercises it rightfully only in a proper defense of the country from some danger anticipated or actual."[380]

International Law, vol. III, chapters IX – XI, Washington, Government Printing Office, 1942, vol. III, p. 717. "The right of expelling foreigners is also generally held to be an attribute or incident of sovereignty, and is probably practiced, to a greater or less extent, by all political communities." Amos S. Hershey, *The Essentials of International Public Law and Organization*, rev. ed., New York, The Macmillan Company, 1927, p. 374 (citations contra omitted). "Just as a State, in the exercise of its sovereignty, can admit, or deny entry to, an alien, the State can also expel or deport an alien. Such a right is essential for the protection of the State and for the maintenance of its public order, morality and public health." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 89. *See also* United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955, pp. 1-77. (ST/SOA.22 and Corr.2 (replaces Corr.1)), para. 102; and Herbert W. Briggs, *The Law of Nations. Cases, Documents and Notes*, 2nd ed. New York, Appleton-Century-Crofts, Inc., 1952, p. 525.

[377] *Règles internationales*, note 56 above, preambular para. 1 [French original].

[378] *See*, for example, International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 4668, p. 171, article 13; Convention on Status of Aliens, Havana, 20 February 1928, *in* Charles I. Bevans (dir.), *Treaties and other international agreements of the United States of America 1776-1949, vol. 2: Multilateral*, 1918-1930, pp. 710-713, article 6, para. 1; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984, *European Treaty Series*, No. 117, article 1 (the text as amended by Protocol No. 11 of 11 May 1994 is available on the internet at www.coe.int); American Convention on Human Rights, "Pact of San José, Costa Rica", San José (Costa Rica), 22 November 1969, United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123, article 22, para. 6; African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217, article 12, para. 4.

[379] See, for example, *Lacoste v. Mexico* (Mexican Commission), Award of 4 September 1875, in John Bassett Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party, vol. IV, pp. 3347-3348; and Yeager v. The Islamic Republic of Iran, Iran-United States Claims Tribunal, Award of 2 November 1987, Iran-United States Claims Tribunal Reports, vol. 17, pp. 92-113.

[380] *Maal Case*, Mixed Claims Commission Netherlands-Venezuela, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 730-733, at p. 731.

188. Similarly, in the *Boffolo Case* decided by the Mixed Claims Commission Italy-Venezuela, the Venezuelan Commissioner expressed the view, shared by the Italian Commissioner,[381] that: "The right to expel foreigners is fully held by every State and is deduced from its very sovereignty".[382] Independently of its characterization as an incident of State sovereignty, the right of expulsion was clearly recognized by the Umpire in the *Boffolo Case*. The Umpire referred to the "general power" of States to expel aliens and to the requirement that this power be exercised rightfully. "That a general power to expel foreigners, at least for cause, exists in governments can not be doubted .... But it will be borne in mind that there may be a broad difference between the right to exercise a power and the rightful exercise of that power ..."[383]

189. In the *Paquet Case* decided by a Mixed Claims Commission Belgium-Venezuela, the Umpire recognized the right of expulsion while limiting its functions to the protection by a State of its public order or to the implementation of highly political considerations, as follows: "The right to expel foreigners from or prohibit their entry into the national territory is generally recognized ... each State reserves to itself the exercise of this right with respect to the person of a foreigner if it considers him dangerous to public order, or for considerations of a high political character ...".[384]

190. The right of expulsion has also been recognized in regional court and commission decisions. The jurisprudence of the European Court of Human Rights affirms the right of States to expel aliens for the purpose of preserving public order. In this respect, the Court consistently refers in its case law to "the Contracting States' concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens ...".[385] The African Commission on Human and Peoples' Rights

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[381] *Boffolo Case*, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 528-538, at p. 529.

[382] Ibid., p. 528.

[383] Ibid., pp. 531-532 (Ralston, Umpire). The existence of the right to expel was reiterated in the *Oliva Case*, which made specific reference to the *Boffolo Case*: "The umpire does not find it necessary to again discuss the principles governing the right of expulsion. The existence of this right was recognized and the dangers incident to its exercise were sufficiently pointed out in the case of Boffolo ..."; *Oliva Case*, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 600-609, at p. 608 (Ralston, Umpire).

[384] *Paquet Case (Expulsion)*, Mixed Claims Commission Belgium-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. IX, pp. 323-325, at p. 325 (Filtz, Umpire).

[385] *Case of Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, Application number 12313/86, para. 43. See also: *Case of Vilvarajah and others v. United Kingdom*, Judgment (Merits), 30 October 1991, Application numbers 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 102; *Case of Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application number 22414/93, para. 73; *Case of Ahmed v. Austria*, Judgment (Merits and Just Satisfaction), 17 December 1996, Application number 25964/94, para. 38; *Case of Bouchelkia v. France*, Judgment (Merits), 29 January 1997, Application number 23078/93, para. 48; and *Case of H.L.R.. v. France*, Judgment (Merits), 29 April 1997, Application number 24573/94, para. 33.

addressed the specific situation of illegal immigrants from the perspective of their possible expulsion as follows: "The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide."[386]

191. The right of expulsion has been further recognized in other documents adopted at the international or regional level. In this regard, the Executive Committee of the Programme of the United Nations High Commissioner for Refugees recalled in Conclusion No. 96 "the right of States, under international law, to expel aliens while respecting obligations under international refugee and human rights law ..."[387] In 1961, the Asian-African Legal Consultative Committee (renamed in 2001 as the Asian-African Legal Consultative Organization) adopted a set of principles concerning the admission and treatment of aliens, according to which "A State shall have the right to order expulsion or deportation of an undesirable alien in accordance with its local laws, regulations and orders."[388]

192. Furthermore, the right of expulsion has been recognized in the national laws of a number of States.[389] The right of expulsion may be expressly provided for in the constitution of the State.[390] This

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[386] African Commission on Human and Peoples' Rights, Communication No. 159/96, Union Interafricaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal et Association Malienne des Droits de l'homme v. Angola, *Eleventh Annual Activity Report*, 1997-1998, para. 20.

[387] UNHCR, Executive Committee Conclusion No. 96 (LIV) – 2003: Conclusion on the return of persons found not to be in need of international protection, 10 October 2003, preambular para. 4.

[388] Principles, note 369 above, article 16, para. 1.

[389] "Although it is now generally assumed that the power to expel aliens is inherent in every sovereign and independent nation, it was never at any time very clear whether the exercise of this power lay within the prerogative of the Crown ... What power there was resided in statute, the purpose of which seems to have been to enact the power, rather than to declare its continuing existence. In *Attorney-General for Canada* v. *Cain*, however, the Privy Council did not doubt that the Crown possessed the power to expel even a friendly alien from Canada, and to remove him to the country whence he came ... Since 1905, the power of expulsion in the United Kingdom has been regulated by statute, but there are many more recent decisions which tend to reflect this return to primitive notions of 'sovereign' rights ... *See* the cases involving alien enemies: *Netz* v. *Chuter Ede* [1946] Ch. 224; *R.* v. *Bottrill, ex parte Küchenmeister* [1947] I K.B. 41, per Scott L.J., at p. 51; see also remarks of Lord Denning M.R., in *Schmidt* v. *Home Secretary* [1969] 2 Ch. 149, 168-9, 171, and *R.* v. *Governor of Pentonville Prison, ex parte Azam* [1973] 2 W.L.R. 949, 960, 963. Cf. Opinion of the Assistant Under-Secretary of State, 1901, 6 *B.D.I.L.* 211." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 243, n. 5 (other citations omitted).

[390] See the Constitution of Switzerland, article 121, para. 2 ("Aliens who threaten the security of the country may be expelled from Switzerland.") [French original.] "The Constitution of the United States makes no mention of any power regarding the entry and removal of aliens, but the Supreme Court has held such power to be 'an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare'." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 238 (citations omitted) (quoting *Fong Yue Ting* v. *U.S.* 149 U.S. 698, 711 (1893)).

right has also been recognized by the national courts of various States as early as the late nineteenth century.[391] In 1893, the United States Supreme Court recognized the right of expulsion as an inherent and inalienable right of every State as follows:

> "The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. […] The right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and

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[391] "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Nishimura Ekiu v. United States et al.*, Supreme Court of the United States, 18 January 1892, 142 U.S. 651. "One of the rights possessed by the supreme power in every State is the right … to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests." *Att.-Gen. for Canada* v. *Cain*, [1906] A.C. 542 at p. 546 (as reproduced in David John Harris, *Cases and Materials on International Law*, 4th ed., London, Sweet & Maxwell, 1991, p. 500). See, e.g., *In re Everardo Diaz*, Supreme Federal Tribunal of Brazil, 8 November 1919: "It is an accepted principle in Public International Law that the State has the power, as an attribute of sovereignty, to expel from its territory or to prohibit from entering it foreigners harmful to the social security or public order. It is a right of conservation, of defence, inherent in the organisation of the State; it does not depend on the law that recognises it; it is enough that the law does not prohibit its exercise." (quoted from the *Annual Digest of Public International Law Cases*, 1919-1922, Sir John Fischer Williams and H. Lauterpacht (eds.), Case No. 179, pp. 254-257, at p. 255); "It is a well-established principle in international law that foreigners enter a sovereign State only by permission and on the sufferance of the State, and they are liable to be expelled or deported from the State at the pleasure of the authorities who exercise the sovereign power of the State." *Salebhoy v. The Controller of Immigration*, Burma, Chief Court, 24 January 1963, *International Law Reports*, volume 36, E. Lauterpacht (ed.), pp. 345-350, at p. 348; "The right of expulsion of undesirable foreigners as well as of exclusion or expulsion of ineligible aliens, being based on the free exercise by the State of its sovereignty, it is natural that there should be no right of appeal on any ground against it." *In re Krupnova*, Venezuela, Federal Court of Cassation, 27 June 1941, *Annual Digest and Reports of Public International Law Cases*, 1941-1942, H. Lauterpacht (ed.), Case No. 92, p 309; "Nor does it [the Convention on the Status of Aliens, signed at the Sixth International American Conference in the City of Havana, Cuba, in the year 1928] contradict the provisions on expulsion of aliens, since the right not to expel a person, even when undesirable, or to condition such expulsion, as defined in Article 2 of said Law of 1894, is a sovereign right of each State." *Hearn v. Consejo de Gobierno*, Court of Cassation of Costa Rica, 17 September 1962, *International Law Reports*, volume 32, E. Lauterpacht (ed.), pp. 257-260, at p. 259; "Generally, it can be said that a State's right to expel aliens is a logical and necessary consequence of its sovereignty and independence, exercisable in conformity with its laws and/or such administrative concessions as it might wish to bestow in due recognition of 'humanity' and 'justice'." *Brandt v. Attorney-General of Guyana and Austin*, Guyana, Court of Appeal, 8 March 1971, *International Law Reports*, volume 70, E. Lauterpacht, C.J. Greenwood (eds.), pp. 450-496, at p. 455; "Canada, as a Sovereign power, has a right to exclude from her borders those who have not by nationality or citizenship a claim to admission. The power to exclude includes the power to remove those whose entry has not been authorized." *Chan v. McFarlane*, Canada, Ontario Court of Appeal, 13 June 1962, *International Law Reports*, volume 42, E. Lauterpacht (ed.), pp. 213-218, at p. 216); and "The basis of the right to expel aliens is the right to ensure the safety of the realm, a right which cannot be waived as regards any category of aliens whatsoever." *George Talma et Al. v. Minister of the Interior*, Estonia, Council of State, 14 October 1927, *Annual Digest and Reports of Public International Law Cases*, 1935-1937, H. Lauterpacht (ed.), Case No. 142, p. 313).

> independent nation, essential to its safety, its independence and its welfare. […] The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power."[392]

B. The discretionary nature of the right of expulsion

193. A State may exercise broad discretion[393] in determining whether the continuing presence of an alien in its territory is contrary to its interests and whether to exercise its right of expulsion.

> "Whether an alien may lawfully be expelled is a matter within the discretionary power of the expelling government. This discretionary power is subject only to limits in extreme cases because under customary international law no State has a duty to harbour aliens in its territory. …Thus, under international law, the freedom of States in matters of expulsion is nearly unlimited."[394]

194. In light of the substantive and procedural limitations on the right of expulsion under contemporary international law, which will be examined throughout this paper, it appears doubtful that this right may still be considered as "nearly unlimited". However, States do possess a considerable degree of discretion in exercising their right of expulsion, as confirmed in some arbitral awards.

195. In the *Maal Case*, the Umpire highlighted the "large discretionary powers" that States may exercise with respect to their right of expulsion in the following terms: "There is no question in the mind of the umpire that the Government of Venezuela in a proper and lawful manner may exclude, or if need be, expel persons dangerous to the welfare of the country, and may exercise large discretionary powers in this regard."[395]

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[392] *Fong Yue Ting v. United States*, Supreme Court of the United States, 15 May 1893, 149 U.S. 698, at pp. 707, 711 and 713.

[393] "Expressions such as 'discretion' are designed to convey the broad authority of a government to determine how a specified situation should be treated …" Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. ix.

[394] Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at pp. 110-111. "Since 1914 most states have claimed wide powers of deportation." Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed., London/New York, Routledge, 1997, p. 261. *See also* Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, vol. 1, 1992, pp. 102-107, at p. 104. In his fifth report on State responsibility, Mr. García Amador also mentioned the "wide discretionary powers" enjoyed by States in this respect; *see* International responsibility, Fifth report by F. V. García Amador, Special Rapporteur (Responsibility of the State for injuries caused in its territory to the person or property of aliens – Measures affecting acquired rights (*continued*) and constituent elements of international responsibility), *Yearbook of the International Law Commission*, 1960, vol. II, A/CN.4/125, paras. 76 and 77.

[395] *Maal Case*, Mixed Claims Commission Netherlands-Venezuela, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 730-733, at p. 731.

196. In the *Yeager v. The Islamic Republic of Iran* case, the Iran-United States Claims Tribunal pointed out that States, while respecting certain substantive and procedural limitations, enjoy wide discretion in exercising their right to expel an alien. "It is the prevailing view that a State has wide discretion in expelling foreigners. Certain procedural and substantive minimum standards, however, are guaranteed under international law".[396]

197. The national laws of some States recognize an element of discretion in the expulsion of aliens. The competent authorities may enjoy discretion with respect to the decision to expel an alien as well the implementation of the decision.[397] The national courts of some States have also recognized the discretionary nature of the right of expulsion.[398]

C. The limited nature of the right of expulsion

198. The discretionary nature of the right of a State to expel aliens from its territory is subject to limitations under international law.[399]

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[396] *Yeager v. The Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of 2 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, pp. 92-113, at p. 106, para. 49.

[397] A State may place at the discretion of the competent authority: (1) the decision to recommend or require that the alien leave the State's territory (Republic of Korea, 1992 Act, articles 67-68); (2) the final decision on an expulsion recommended by a court (Nigeria, 1963 Act, article 21); (3) the timing of the alien's change to unlawful status (Kenya, 1967 Act, article 4(4)); (4) whether to exempt any person or class of persons from the relevant laws dealing with non-citizens (United Kingdom, 1971 Act, section 8(2)); (5) the manner of the alien's deportation (Kenya, 1967 Act, article 8(3)-(4)); as well as (6) the revocation of the expulsion or deportation order (Kenya, 1967 Act, article 8(4), and Nigeria, 1963 Act, article 21).

[398] "We are fortified in the view which we take in this matter by the observation of the Supreme Court in *Kyi Chung York* v. *The Controller of Immigration* (1951) B.L.R. (S.C.) 197. There it was held that every country which extends its hospitality to an alien can withdraw it and send him back to his own country, that every power has the right to refuse to permit an alien to enter the State and if it permits an alien to enter, to annex what conditions it pleases to such permission and expel or deport him from the State at pleasure, and that this principle is to be found embodied in Section 3 of the Foreigners Act whereby the President may order any foreigner to remove himself from the Union of Burma." *Sitaram v. Superintendent, Rangoon, Central Jail*, Burma, High Court, 15 February 1957, *International Law Reports*, volume 28, E. Lauterpacht (ed.), pp. 313-314, at p. 314). *See* also *Muller v. Superintendent, Presidency, Jail, Calcutta, and Others*, Supreme Court of India, 23 February 1955 "The Aliens Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision limiting this discretion in the Constitution, an unrestricted right to expel remains." (quoted from (1958) Year 1955 ILR 497, at p. 498) Moreover, such discretion is also reflected in the relatively limited scope of review over expulsion decisions exercised by national courts in some jurisdictions. *See* Part VIII.B.9.

[399] "On the other hand, while a state has a broad discretion in exercising its right to expel aliens, its discretion is not absolute." Robert Jennings and A. Watts, *Oppeinheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 940. The right of expulsion "... is not unqualified. It cannot be exercised indiscriminately or arbitrarily, but is limited and restricted by the obligations imposed upon the state by international law." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The

> "Just as the rules of international law regulate the power of States to determine the class of persons who shall be nationals, so too are limitations placed upon the discretionary competence of States in regard to the entry and expulsion of aliens. States retain a varying amount of freedom of action, but their powers are limited in extent and in the manner of exercise by the legal relations existing between States. Traditional modes of description, to the effect that the State enjoys 'sovereign rights' of exclusion and expulsion, tend to overplay the competence and to leave unresolved the conflict between claims to exclusive jurisdiction, on the one hand, and competing principles of accommodation and good faith, on the other. It must be emphasized that these general principles are backed up by particular rules regulating the exercise of the powers in question, in given circumstances. The validity of an exclusion or an expulsion must be determined in the light of the State's obligations, whether they derive from custom, treaty, or general principles of law."[400]

199. The rules of international law which govern the right of a State to expel aliens include the substantive as well as the procedural conditions for the lawful expulsion of an alien.[401]

Banks Law Publishing Co., 1915, p. 49 (citing Von Bar in 13 Clunet (1886), 5; Bluntschli, Droit int. codifié, paras. 383-384; Rolin-Jacquemyns in 20 RDI. (1888), 498). "The power of expulsion is a discretion, not absolute, but limited by the rules and standards of international law. [...] The power of expulsion is a sovereign right, in that it pertains to every State for that State's protection, but it is a power which is controlled and limited, particularly by treaty obligations, and generally, by the obligations imposed by customary international law." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 204 and 310. "It appears to have been in the second half of the last [nineteenth] century that limitations on the right to expel individual aliens came to be firmly recognized and expressly discussed by theorists and practitioners of international law." Richard Plender, "The Ugandan Crisis and the Right of Expulsion under International Law", *The Review: International Commission of Jurists*, No. 9, 1972, pp. 19-32, at p. 23. "In recent years it has become increasingly apparent, however, that the right of expulsion is subject to significant restrictions imposed by public international law. Such restrictions apply both in the case of collective expulsion and in the case of the expulsion of individuals." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 459 (citations omitted).

[400] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 21. "Many so called rights of states are in the nature of discretions. In a great number of cases, international law confers some discretion on states in the exercise of their rights. Thus, states enjoy a certain amount of discretion in, for example, the exercise of the right of expropriation, the delimitation of their territorial sea, the admission and expulsion of aliens, and the conferment of nationality. However, as in municipal law, the exercise of these discretions is not without limitations, but must conform to legitimate ends." B. O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, pp. 47-92, at pp. 82-83.

[401] "In former times expulsion, collective and individual, was freely exercised ... Individual expulsion, while still practiced, and claimed by states to be an inherent right of sovereignty, has likewise been limited, by statute and treaty, both as to the justifying causes and the manner of exercise." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 49. *See* also *In re Watemberg*, Council of State, 13 December 1937, *Annual Digest and Reports of Public International Law Cases*, 1938-1940, H. Lauterpacht (ed.), Case No. 137, pp. 384-386: "In proceeding thus, the Council did no more than adapt its judgment to the juridical practice which has been establishing itself

> "In all of these respects the power of expulsion is typical of the competences possessed by States with respect to the entry and residence of aliens. Formerly characterised as aspects of the State's absolute discretion, these powers are regulated and controlled, both as to their substance and as to their form, by a system of rules now sufficiently advanced and cohesive to be described as the international law of migration."[402]

200. The right of a State to expel aliens may be limited by traditional rules relating to the relations between States as well as by more contemporary rules relating to the protection of individuals.

> "Expressions such as 'discretion' are designed to convey the broad authority of a government to determine how a specified situation should be treated, whereas phrases containing the word 'arbitrary' indicate that there is a limit to an official's discretion and that an arbitrary action constitutes in fact an abuse of that discretion. The rules thus define both the powers of a State and the limits of its authority, and provide protection to an individual against the abuse of that authority. Some of the Governing Rules emphasize this aspect of the law and its role in protecting the fundamental human rights of individuals wherever they go; they also make clear that alienage may not be used to deprive individuals of their human rights. Other Governing Rules reflect the more traditional method of the international legal system in so far as they focus on relations between States as well as on their respective rights and duties."[403]

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in conformity with the development of international relations, in the sense that the expulsion of a foreigner, which was an absolute right under the territorial law, has undergone limitations which affect both the formal aspect and the content of such power. What law and custom had left to the discretion of the head of the State … has now become a matter of jurisdictional control, which requires the Administration to function under certain regulations or within the requirements of a treaty—to submit itself, in short, to the regime of law." (quoted from (1942) Years 1938-1940 Annual Digest and Reports of Public International Law Cases 384, at p. 385).

[402] Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 477.

[403] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. ix-x.

VI. GENERAL LIMITATIONS ON THE RIGHT OF A STATE TO EXPEL ALIENS

A. Traditional limitations

1. The prohibition of the abuse of rights

201. The limitations on the right of a State to expel aliens have evolved over the centuries. In the nineteenth and early twentieth centuries, the right of expulsion was primarily limited by general standards relating to: (1) the prohibition of abuse of rights, (2) the principle of good faith, (3) the prohibition of arbitrariness and (4) the treatment of aliens.

202. The notion of abuse of rights refers to the exercise by a State of an otherwise lawful right in an unlawful manner.[404] The origins of the doctrine of abuse of rights may be traced to Roman law.[405] The

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[404] "The doctrine of abuse of rights plays a relatively small part in municipal law, not because the law ignores it, but because it has crystallized its typical manifestations in concrete rules and prohibitions. In international law, where the process of express or judicial law-making is still in a rudimentary stage, the law of torts is confined to very general principles, and the part which the doctrine of abuse of rights is called upon to play is therefore particularly important." Hersch Lauterpacht (ed.), *The Function of Law in the International Community*, Oxford, Clarendon Press, 1933, p. 298. "Any rule against the abuse of rights is based upon, and cannot exist apart from, the existence of a discretion in some person. [...] In outline, this structure parallels that of *abus de droit* in French private law. It is not every 'right' which is reviewable for abuse but only those which are susceptible of limitation by reference to the reason for exercising them." G.D.S. Taylor, "The Content of the Rule Against Abuse of Rights in International Law", *The British Year Book of International Law*, London, Oxford University Press, 1972-1973, pp. 323-352, at pp. 350 and 352. "In conclusion it may be said that the doctrine is a useful agent in the progressive development of the law, but that, as a general principle, it does not exist in positive law. Indeed it is doubtful it if could be safely recognized as an ambulatory doctrine, since it would encourage doctrines as to the relativity of rights and result, outside the judicial forum, in instability." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 52 (citation omitted). "In international law, abuse of rights refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State. [...] The evolutive role of the concept of prohibition of abuse of rights has been stressed by several authors. Conflicts where an abuse of rights is alleged or is likely to exist can lead the States involved to adopt specific rules which are designed to solve the problem for the future. At a general level, the concern to avoid such conflicts can result in the long term in the emergence of new customary rules ..." Alexandre Kiss, "Abuse of rights", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 4-8, at pp. 4 and 8. *See* also: Nicolas-Socrate Politis, "Le Problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux", *Recueil des cours de l'Académie de droit international*, vol. 6, 1925-I, pp. 1-121; and International responsibility, note 394 above, paras. 70-78.

[405] "The concept of abuse of rights implies the negation of a rigid conception of international law, and of law in general, summarized by the maxim *neminem laedit qui suo jure utitur,* meaning that nobody harms another when he exercises his own rights. *Summum jus,* the maximum of law, may thus become *summa injuria,* a maximum of injustice. The principle of Roman law, *sic utere jure tuo ut alienum non laedas,* prescribing the exercise of individual rights in such a way that others would suffer no injury, is therefore the very fundament of the concept of abuse of rights. A clear violation of an existing specific obligation cannot constitute an abuse of right, since in such a case the State which acted had no right at all. There should thus be no confusion between abuse of rights and situations where a State acts *ultra vires,* since in the latter case it has exceeded the limits of its rights, i.e. it

prohibition of abuse of rights has been presented as inherent in the "general concept" of law.[406] The essence of the doctrine has been described as follows:

> "The essence of the doctrine is that, as legal rights are conferred by the community, the latter cannot countenance their anti-social use by individuals; that the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights; and that there is such an abuse of rights each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized, individual right. For the determination of such abuse of rights the question of subjective fault and intention may, but need not always, be material."[407]

203. There are different views regarding the extent to which the notion of abuse of rights is recognized as a matter of international law.[408] The authors who believe that the notion of abuse of

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has no right at all." Alexandre Kiss, "Abuse of rights", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, vol. 1, Amsterdam, Elsevier Science Publishers, 1992, pp. 4-8, at pp. 4-5.

[406] *See* Dailler, Patrick and Pellet, Alain, *Droit international public*, Paris, L.G.D.J., 1999, p. 349. The authors list the prohibition of abuse of rights among the principles "linked to the general concept of law".

[407] Hersch Lauterpacht (ed.), *The Function of Law in the International Community*, Oxford, Clarendon Press, 1933, p. 286. "The essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have *bona fide* reasons for what it does, and not act arbitrarily or capriciously." Gerald G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: General Principles and Substantive Law", *British Year Book of International Law*, vol. 27, 1950, pp. 1-41, at pp. 12-13. "Bad faith, dishonesty—those of course, stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. … It is true the discretion must be exercised reasonably … For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority." Judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation,* [1948] 1 K.B. 223 at 228-9. "Upon translation into international adjudication, the jurisprudence shows sufficient coherence to posit a general principle prohibiting abuse of right in international law. English administrative law categories provide a content from which a general principle may be arrived at inductively: no person may, under international law, exercise a power for a reason, actual or inferred, which is contrary to the purpose or purposes for which international law contemplates the power will be used." G.D.S. Taylor, "The Content of the Rule Against Abuse of Rights in International Law", *The British Year Book of International Law*, London, Oxford University Press, 1972-1973, pp. 323-352, at p. 352. "It seems that the fact of injury resulting from an abuse of rights is a fundamental element in the implementation of that principle. […] Of course, the second condition of international responsibility, namely, conduct attributable to the State concerned, has also to be fulfilled. It does not seem, however, that intention to harm other States is required: an injurious or arbitrary use of rights, competences or discretions can be considered sufficient in this regard." Alexandre Kiss, "Abuse of rights", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 4-8, at pp. 7-8.

[408] "On the whole, it may be considered that international law prohibits the abuse of rights. However, such prohibition does not seem to be unanimously accepted in general international law …" Alexandre Kiss, "Abuse

rights exists as a matter of international law emphasize the assertion of this notion in international judicial and arbitral proceedings, its appearance in separate or dissenting judgments and opinions as well as its recognition in the national legal systems of many countries.[409] In contrast, the authors who do not believe that any such notion exists as a matter of international law argue that it has never provided the basis for a decision or an award in any international case in which it was asserted.[410] In

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of rights", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 4-8, at p. 5. In at least one case, a national court seemingly recognized the applicability of the abuse of power doctrine to expulsion under international law. See *Re Th. and D.*, Conseil d'Etat, 16 March 1953, *International Law Reports*, 1951, H. Lauterpacht (ed.), Case No. 92, pp. 301-302, at p. 302 "[At the expiration of the international agreement, the] Egyptian Government recovered all its sovereign rights in so far as the expulsion of aliens is concerned, without being subject to interference in this respect so long as there is no abuse of power or violation of the law."

[409] "[T]he prohibition of abuse of rights is a general principle of law." Hersch Lauterpacht (ed.), *The Function of Law in the International Community*, Oxford, Clarendon Press, 1933, p. 298. "The doctrine of abuse of rights, arising from the failure of States or governments to exercise their rights in good faith and with due regard to the consequences of such exercise, has not been affirmed by the Court. It does, however, figure prominently in a number of the separate or dissenting judgments and opinions ..." Gerald G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: General Principles and Substantive Law", *British Year Book of International Law*, vol. 27, 1950, pp. 1-41, at p. 12. "Relatively few authors have troubled to study the applicability of the doctrine of 'abuse of rights' in international relations. The majority of those who have done so, however, have not only reached the conclusion that the doctrine can and should be applied in order to solve particular problems, but also contend that its applicability has already been adequately demonstrated in practice. [...] A survey of international practice, particularly in the jurisprudence of the courts and claims commissions, clearly shows that at least the basic principle of the prohibition of abuse of rights is applicable in international relations." International responsibility, note 394 above, paras. 70 and 73. *See also* Francisco V. García-Amador, *The Changing Law of International Claims*, vol. I, New York, Oceana Publications, 1984, pp. 108-113. "The present writer has also not come across any decision of an international tribunal in which liability has been expressly founded on abuse of right. However, the fact that the concept has often been invoked suggests strongly that it has a very useful role to play in the context of international responsibility." B. O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, pp. 47-92, at p. 92. "Most of these authors came to the conclusion that in civil law countries, whether European or not, as well as in socialist countries, the abuse of rights was, along with *détournement de pouvoir*, prohibited. As far as common law countries are concerned it was submitted that, although a decision in a given case may be based upon principles of the law of torts, when a court looks into the motives of an actor the legal theory applicable is indistinguishable from that of abuse of rights. This, it was held, supports the contention that the theory is accepted in the private law of common law countries... Some have concluded, therefore, that since the concept of abuse of rights is known in many countries it may be said to be a general principle of law." Alexandre Kiss, "Abuse of rights", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 4-8, at p. 6. "The decisions of some international tribunals and the practice of a number of states reveal that the principle of abuse of right has become accepted as part of international law and that states may, and often do, invoke the principle as the basis of an international claim." B.O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, pp. 47-92, at p. 72.

[410] "The present writer has reservations concerning the precise role, as an independent and necessary principle, of the doctrine of abuse of rights. A major issue is the logical question-begging involved: to be relevant the doctrine must presuppose that the legal validity of the exercise of a power or privilege is dependent upon the presence of certain objectives." Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part I, Oxford,

this regard, attention has been drawn to problems relating to the burden of proof with respect to this notion,[411] and to the difficulty of articulating a precise definition of the notion of abuse of rights.[412] This has led a number of authors to question its usefulness or to recommend a cautious approach to its application.[413]

Clarendon Press, 1983, p. 70. *See also* Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, pp. 429-430. "However, no international judicial decision or arbitral award has so far been explicitly founded on the prohibition of abuse of rights. The principle has been mentioned in several cases as a possible basis for a condemnation for violation of international law, but without having been actually used for that purpose." Alexandre Kiss, "Abuse of Rights", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 4-8, at p. 6. "The doctrine of abuse of rights has received little recognition in international tribunals, and it has not been used explicitly to ground liability." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 210.

[411] "The problem of the proof of the existence of an abuse of rights is a fundamental one. In both cases where the PCIJ referred to the possibility of an abuse of rights, it was stressed that such an abuse cannot be presumed by the Court (German Interests Case, PCIJ, Series A, No. 7, at p. 30 and Free Zones Case, PCIJ, Series A/B, No. 46, at p. 167). In the German Interests Case, the Court added that the burden of proof rested with the party alleging an abuse of rights." Alexandre Kiss, "Abuse of Rights", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 4-8, at p. 8. "Perhaps it is this difficulty of proof which has prevented states from invoking the concept of abuse of right even when the situation in hand would seem to be obviously covered by the concept." B. O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, pp. 47-92, at p. 91.

[412] "No attempt at an exhaustive definition of abuse of rights has ever been successful ..." Frederick A. Mann, "Money in Public International Law", *Recueil des cours de l'Académie de droit international*, vol. 96, 1959-I, pp. 7-124, at p. 93. "However, even among writers who accept the principle of the prohibition of the abuse of rights, there is no agreement on the analysis of its significance and theoretical basis. This divergence of opinion results at least partly from the different forms in which the exercise of an existing right can cause injury to another State, amounting to a *summa injuria*. [...] The idea that a subject of rights and competences can misuse them seems to be inherent to legal thinking and to have roots in all legal systems. The idea leads to the establishment of controls on the use of recognized rights. However, the prohibition of abuse of rights in international law is problematic because of differences in the content of the concept itself: it may include, indeed, a conflict of sovereign rights, an arbitrary exercise of competences or discretions or a *détournement de pouvoir*." Alexandre Kiss, "Abuse of Rights", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 4-8, at pp. 6 and 8. *See also* B. O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, pp. 47-92.

[413] "Some distinguished authors question the importance of the principle in international relations, or object to its lack of precision for practical use." Alexandre Kiss, "Abuse of Rights", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 4-8, at p. 6. "The instances, referred to above, of the possible applications of the doctrine of abuse of rights reveal at the same time its disturbing elasticity and comprehensiveness. For, in theory, there is no matter normally falling within the domain of the exclusive jurisdiction of the State which could not be brought within the purview of the operation of the prohibition of abuse of rights." Hersch Lauterpacht (ed.), *The Function of Law in the International Community*, Oxford, Clarendon Press, 1933, p. 304. "The determination of the point at which the exercise of a legal right has degenerated into abuse of a right is a question which cannot be decided by an

204. Similarly, there have been divergent views in the International Law Commission concerning the usefulness of the notion of abuse of rights. In 1960, García Amador submitted his fifth report, as Special Rapporteur, on the topic of the responsibility of the State for injuries caused in its territory to the person or property of aliens. In this report, he expressed the view that the notion of abuse of rights could address the gaps and the lack of precision that may be found in rules of international law.

> "There is no denying that as a complex of rules international law suffers, to a far greater extent than municipal law, from gaps and lack of precision, that this occurs in customary law as well as in conventional and written law and that these gaps and this lack of precision are to be found in practically all matters which the law of nations embraces.
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> "In view of the foregoing, it is necessarily true that the doctrine of the abuse of rights finds its widest application in the context of 'unregulated matters', that is, matters which 'are essentially within the domestic jurisdiction' of States … The example usually given is the right of the State to expel aliens ..."[414]

205. In contrast, in 1973, Roberto Ago, the subsequent Special Rapporteur for the topic of State responsibility, expressed the view that it was not necessary to consider the notion of abuse of rights in relation to the topic.

> "With regard to the abuse of rights, the Commission had decided, at its twenty-second session, to revert to that question later. He himself still thought there was no need to examine the substance of the problem; for if there were situations in international law in which the exercise of a right was subject to limits, that was because there was a rule which imposed the obligation not to exceed those limits. In other words, the abusive exercise of a right then constituted failure to fulfil an obligation. Hence the statement of the principle that an internationally wrongful act was considered to be the violation of an obligation was enough to cover the case of abuse of a right."[415]

206. The prohibition of the abuse of rights as a matter of international law may have become somewhat more accepted by the end of the twentieth century. For example, it appears in the 1982

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abstract legislative rule, but only by the activity of courts drawing the line in each particular case. […] These are but modest beginnings of a doctrine which is full of potentialities and which places a considerable power, not devoid of a legislative character, in the hands of a judicial tribunal. There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which, apart from other reasons calling for caution in the administration of international justice, must be wielded with studied restraint." Hersch Lauterpacht (ed.), *The Development of International Law by the International Court*, London, Stevens & Sons Limited, 1958, pp. 162 and 164. *See also* Georg Schwarzenberger, *International Law and Order*, London, Stevens & Sons, 1971, p. 88.

[414] International responsibility, note 394 above, paras. 76 and 77.

[415] Statement of Roberto Ago made in connection with the introduction of his proposed draft articles, *Yearbook of the International Law Commission 1973*, vol. I, Summary Records, 1205th meeting, para. 12.

United Nations Convention on the Law of the Sea.[416] The notion of abuse of rights and its relevance to the expulsion of aliens has been described more recently as follows:

> "A further restraint on the freedom of action which a state in general enjoys by virtue of its independence, and territorial and personal supremacy, is to be found in the prohibition of the abuse by a state of a right enjoyed by it by virtue of international law. Such an abuse of rights occurs when a state avails itself of its right in an arbitrary manner in such a way as to inflict upon another state an injury which cannot be justified by a legitimate consideration of its own advantage. Thus international tribunals have held that a state may become responsible for an arbitrary expulsion of aliens."[417]

207. The right of a State to expel aliens is one of the most common examples given of an otherwise lawful right which may be exercised in an unlawful manner constituting an abuse of rights.[418]

> "However, long before the doctrine of abuse of rights had been introduced, international tribunals applied it in substance in a number of cases. Their attitude towards the alleged right of expelling aliens at the absolute discretion of the receiving State may be

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[416] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, United Nations, *Treaty Series*, vol. 1834, No. 31363, p. 397, p. 3, article 300: "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."

[417] Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Intro. & Part 1), 1996, p. 407 (citations omitted).

[418] "A closer inquiry shows that the concept of abuse of rights may arise in three distinct legal situations. In the first case, a State exercises its rights in such a way that another State is hindered in the enjoyment of its own rights and, as a consequence, suffers injury … In the second case, a right is exercised intentionally for an end which is different from that for which the right has been created, with the result that injury is caused. This is the concept of *détournement de pouvoir,* well known in administrative practice within States. It has been identified in general inter-State practice… In the third case, the arbitrary exercise of its rights by a State, causing injury to other States but without clearly violating their rights, can also amount to an abuse of rights. In contrast to the preceding situation, bad faith or an intention to cause harm are not necessary to constitute this form. Broader objectives concerning the social function of the right which has been exercised are at stake here, for example in the case of unjustified if not illegal measures imposed upon aliens, including arbitrary expulsion or expropriation. […] Inter-State practice and international judicial proceedings show that the main fields where abuse of rights have been alleged are … the treatment of aliens in general, but in particular alien property rights and expulsion." Alexandre Kiss, "Abuse of Rights", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 4-8, at pp. 5 and 7. "However, the right to expel or deport … must be exercised in conformity with generally accepted principles of international law … and the applicable international agreements ... Consequently, in exercising the right to expel or deport, a State must observe the requirements of due process of law, international and domestic … its officials must not … abuse the powers granted to them by their national law ..." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 89. *See also* Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, vol. 1, 1992, pp. 102-107, at p. 104; and Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* vol. 1, 1992, pp. 109-112.

> mentioned as an instructive example. That there exists such an absolute right has been maintained by many a writer. Thus, for instance, Oppenheim maintains that a State can expel every alien according to discretion, and that the expulsion of an alien without just cause cannot constitute a legal wrong. It would be difficult to find a confirmation of this view in the practice of international tribunals which have been frequently called upon to adjudicate claims for wrongful and indiscriminate expulsion. In the great majority of cases, while admitting the general right of the State to expel aliens, international tribunals stressed at the same time the limitations of this right either in regard to the expulsion itself or to the procedure accompanying it … The conspicuous feature of these awards is the view that the undoubted right of expulsion degenerates into an abuse of rights whenever an alien who has been allowed to take up residence in the country, to establish his business and set up a home, is expelled without just reason, and that such an abuse of rights constitutes a wrong involving the duty of reparation."[419]

208. It has been suggested that the notion of abuse of rights may provide useful guidance in determining the limitations on expulsion even if it is not an established principle of international law.

> "References to function and purpose and to the good faith of the expelling State invite consideration of the doctrine of abuse of rights. This doctrine presents but another aspect of the general issue, whether the right of expulsion is uncontrolled or whether, if the intention behind it is to do harm, it ceases to be an exercise of discretion and becomes unlawful. For example, the 'right' of expulsion may be exercised with the intention of effecting a *de facto* extradition, or in order to expropriate the alien's property, or even for the purposes of genocide, as by mass expulsions over desert frontiers. In such cases the exercise of the power cannot remain untainted by the ulterior and illegal purpose.
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> "It is still a matter of controversy whether a doctrine of abuse of rights even exists in international law. Where States' freedom of action is already limited by customary or conventional law, the doctrine can be of little significance; but, admittedly, customary and conventional rules are often lacking with respect to the entry and removal of aliens. At that point the doctrine may be called in aid. Abuse of rights can then be seen to occur whenever a State avails itself of its rights in such a way as to inflict an injury on another State which cannot be justified by a legitimate consideration of its own advantage; that is to say, when its actions, although strictly speaking 'legal', are coloured by bad faith. While this characterization may be ambiguous, the doctrine can be seen to involve two elements in particular: the recognition of certain rights in favour of the State, and an exercise of those rights in some way contrary to fundamental rules … […]
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> "Although it cannot be affirmed that the doctrine exists as a general principle of positive law, nevertheless the concept of abuse of rights is still helpful in focusing attention on the intentions which motivate expulsion and on the manner of its execution."[420]

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[419] Hersch Lauterpacht (ed.), *The Function of Law in the International Community*, Oxford, Clarendon Press, 1933, p. 289 (referring to the *Boffolo* case and other arbitral awards) (citations omitted).

[420] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 209 and 212 (citations omitted).

209. Different views[421] have also been expressed regarding the value of considering the notion of abuse of rights in relation to the expulsion of aliens as compared to the notions of good faith,[422]

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[421] "That no person may abuse his rights has long been accepted in theory as a principle of international law." G. D .S. Taylor, "The Content of the Rule Against Abuse of Rights in International Law", *The British Year Book of International Law*, London, Oxford University Press, 1972-1973, pp. 323-352, at p. 323. "However, the extent of the application of the still controversial doctrine of the prohibition of abuse of rights is not at all certain." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Intro. & Part 1), 1996, p. 408 (citation omitted). "If emphasis upon *abus de droit* as a cause of action seems to push into the background such other rules as the minimum standard or non-discrimination, this is due to the belief that in most cases occurring in international practice the latter causes of action will be found to be merged in and, therefore, superseded by *abus de droit,* which, founded on an important principle of law, constitutes a sufficient as well as an effective head of tortuous liability." Frederick A. Mann, "Money in Public International Law", *Recueil des cours de l'Académie de droit international*, vol. 96, 1959-I, pp. 7-124, at pp. 92-93. "The existence of similar or identical principles of law, therefore, need not compel the conclusion that abuse of right is either non-existent or redundant. The different doctrines or theories of relief complement each other. In many cases, the claim of abuse of right may involve a better appraisal of the factual situation revolving around the use of a right, a power, or a discretion." B. O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, pp. 47-92, at p. 90.

[422] "Others [distinguished authors] consider it [the principle of abuse of rights] to be lacking in value as an independent rule, asserting that it consists essentially of an application of other uncontested concepts such as good faith, reasonableness, good neighbourliness or even equity." Alexandre Kiss, "Abuse of Rights", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 4-8, at p. 6. "Individual judges of the International Court of Justice have sometimes referred to it [abuse of rights]; possibly it is implied in the frequent judicial affirmation of the obligation of states to act in good faith." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Intro. & Part 1), 1996, pp. 407-408 (referring to Judge Azevedo in the *Admission Case,* ICJ Rep (1948), pp. 79, 80; Judge Alvarez in the *Admission (General Assembly) Case,* ICJ Rep (1950), p. 15; Judge Anzilotti in the *Electricity Company of Sofia Case,* Series A/B, No 77, p. 88; as well as the Joint Dissenting Opinion in the *Admission Case,* ICJ Rep (1948), pp. 91-92). "Good faith may be said to cover the somewhat narrower doctrine of 'abuse of rights', which holds that a State may not exercise its international rights for the sole purpose of causing injury, nor fictitiously to mask an illegal act or to evade an obligation. While these specifications would indeed appear to follow from the principle of good faith, perhaps the better view is that there is no need for an independent, even if subsidiary, concept of abuse of rights. For if a State in the exercise of its rights were to cause injury to the entitlements of another State, then, upon analysis, the first State has not in fact exercised a 'right' under international law. Rather, it has violated a rule of international law that obliged it not to cause a legally cognizable injury to another State." Anthony D'Amato, "Good Faith", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, vol. 2, 1995, pp. 599-601, at p. 600. "A strong *prima facie* case exists that good faith as a formative principle has performed its function well enough to enable us to dispense with any further hypothesis of the prohibition of abuse of rights. […] Once an international judicial institution has made up its mind that it desires to have resort to any balancing process between conflicting rights, good faith and reasonableness are certainly preferable to less articulate criteria in accordance with which, otherwise, such adjustments between conflicting rights might be made." Georg Schwarzenberger, *International Law and Order,* London, Stevens & Sons, 1971, pp. 103 and 107. See also Georg Schwarzenberger, "The Fundamental Principles of International Law", *Recueil des cours de l'Académie de droit international*, vol. 87, 1955-I, pp. 290-383, at p. 318. "Expulsion may savor of an abuse of power if the decision to expel be not founded on a *bona fide* belief as to the evil effect upon the State of the continued presence of the individual within its domain." Charles Cheney Hyde, *International Law; Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 230. "Since good faith has been presented sometimes as a subjective

arbitrariness,[423] non-discrimination or ulterior and illegal motive[424] discussed below. It has also been suggested that the notion of abuse of rights may be similar to, although distinct from, the doctrine of *détournement de pouvoir.*[425]

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criterion, sometimes as an objective criterion of the abuse of rights, there seem to be close ties between the two notions … In relation to the abuse of rights, good faith plays the role of an objective criterion in the interpretation of the circumstances of fact or law which determined the realization of the illicit act." Elisabeth Zoller, *La Bonne Foi en Droit International Public*, No. 28, Paris, Editions A. Pedone, 1977 (English Summary pp. ix-xxvi, at p. xiv) (see also original French, sections 104-122). "Despite some *dicta* by individual judges … no theory of abuse of rights in the international sphere has taken real shape in international practice and jurisprudence. The matter may to a limited extent be one of terminology: it may be sufficient to employ the concept of good faith …" Hugh Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989", *The British Yearbook of International Law*, vol. 60, 1989, pp. 1-158, at p. 25.

[423] "Thus arbitrary action, either in the choice of the individual expelled, or in the method of expulsion, would indicate an abuse of power and point to internationally illegal action." Charles Cheney Hyde, *International Law; Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, pp. 230-231 (citation omitted). "Abuse of right is usually an alternative theory in cases involving arbitrary, unreasonable, or discriminatory treatment of aliens." B. O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, pp. 47-92, at p. 86. "On the other hand, while a state has a broad discretion in exercising its right to expel aliens, its discretion is not absolute. Thus, by customary international law it must not abuse its right by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 940. "The notion of 'arbitrary action' is in fact so closely linked to the doctrine of 'abuse of rights' as to be largely coterminous in practice." International Law Commission, International responsibility, Fourth report by F. V. García Amador, Special Rapporteur (Responsibility of the State for injuries caused in its territory to the person or property of aliens – Measures affecting acquired rights), *Yearbook of the International Law Commission*, 1959, vol. II, A/CN.4/119, para. 29. See also International responsibility, note 394 above, para. 77: "[T]he State possesses the right to take measures restricting human rights and fundamental freedoms for reasons of internal security, the economic well-being of the nation, to ensure order, to protect health and morals, etc. Consequently, where this right is not governed by explicit and exact rules, the international responsibility may be incurred by the State through a violation of human rights and fundamental freedoms in such cases will only be imputable on the grounds of an unjustified and arbitrary, i.e. 'abusive', exercise of the discretionary power".

[424] "If the discretionary right of exclusion or expulsion were shown to have been used primarily for the ulterior motive of facilitating expropriation of an alien's properties, all of the elements of a strict case of abuse of right would have been present." B.O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, pp. 47-92, at p. 87 (referring to the *Nottebohm* case).

[425] "As a result, only the second hypothesis, good faith as an objective criterion of the abuse of rights, holds, bringing this theory close to that of the *détournement de pouvoir* received in French law. Thus, the good faith of the State should be evaluated in function of the goal imposed by international law on the exercise of all jurisdiction, that goal being fixed either by a conventional or by a customary regime." Elisabeth Zoller, *La Bonne Foi en Droit International Public*, No. 28, Paris, Editions A. Pedone, 1977, English summary pp. ix-xxvi, at p. xiv (see also original French sections 104-122). "'Abuse of rights' may have some affinities with, although it is distinct from, the doctrine of *détournement de pouvoir.* The Court of Justice of the European Communities has jurisdiction to hold invalid acts of the Council and Commission of the Communities on grounds, *inter alia,* of misuse of powers: see Art 230 of the Treaty establishing the EEC, and equivalent Articles of the Treaties

2. The principle of good faith

210. The notion of good faith may be generally understood as referring to the requirement that a State must perform its obligations or exercise its rights in a reasonable, fair and honest manner that is consistent with the object and purpose thereof.[426] There does not appear to be a precise definition of the notion of good faith.[427] The principle of good faith has been described as inherent in the "general concept" of law.[428]

211. The principle of good faith is well-established and generally applicable to the exercise of rights and the performance of obligations by a State under international law.[429] Article 2, paragraph 2,

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establishing the ECSC and Euratom." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Intro. & Part 1), 1996, p. 408, n. 10. "In (for example) French administrative law, if an administrative power or discretion has been exercised for some object other than that for which the power or discretion was conferred, there will be a *détournement de pouvoir.*" Hugh Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989", *The British Yearbook of International Law*, vol. 60, 1989, pp. 1-158, at p. 28 (citation omitted) (referring *inter alia* to Brabant, *Le Droit administrative français* (1984), p. 525; Brown and Garner, *French Administrative Law*, p. 131).

[426] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* Cambridge, Grotius Publications Limited, 1987, p. 105 *et seq*; and Anthony D'Amato, "Good Faith", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 2, 1995, pp. 599-601.

[427] "Judicial opinions and learned writings often lapse into use of the term 'good faith.' There is considerable difficulty in knowing what exactly the term implies. Such rudimentary terms as 'good faith' and 'honesty' elude a priori definition; 'they can be illustrated, but not defined.'" B. O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, pp. 47-92, at p. 50 (quoting Russell v. Russell, [1897] A.C. 436). "Even in the evolution of the legal systems of civilised nations, the notions of malice and good faith have been subject to considerable changes in scope and meaning." Georg Schwarzenberger, *International Law and Order,* London, Stevens & Sons, 1971, p. 306 (citations omitted). "Good faith cannot be reduced to a single, simple definition." Elisabeth Zoller, note 425 above, p. ix (see also original French, sections 13-22). "In a more strictly legal sense, however, equity may be regarded as forming part of certain specific rules of law or even as part of international law generally. Thus it may be regarded as incorporated in and forming a necessary part of certain general principles of law, such as, for example, the principle of good faith." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Intro. & Part 1), 1996, p 44.

[428] Patrick Dailler and Alain Pellet, *Droit international public*, Paris, L.G.D.J., 1999, p. 349. The authors list the principle of good faith among the principles "linked to the general concept of law".

[429] "All this requires good faith, the basic premise upon which all international intercourse is based and in which law can be firmly rooted. The lack of good faith or its abuse obviously leads to a violation of the law." Manfred Lachs, "Some Thoughts on the Role of Good Faith in International Law", *Declarations on Principles,* Leyden, A.W. Sijthoff, 1977, pp. 47-55, at p. 53. "Finally, the principle of good faith may be said to apply, apart from treaties or other agreements, to the general performance of a State's obligations under international law." Anthony D'Amato, "Good Faith", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science, vol. 2, 1995, pp. 599-601, at p. 599. *See also*, Georg Schwarzenberger, "The Fundamental Principles of International Law", *Recueil des cours de l'Académie de droit international,* vol. 87, 1955-I, pp. 290-383, at 290-326.

of the Charter of the United Nations,[430] as well as several other international treaties[431] and other instruments[432] make specific reference to the principle of good faith.

212. The International Court of Justice has referred to the principle of good faith in a number of its judgments[433] and recognized it as a well-established principle of international law.[434] In the *Nuclear*

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[430] This provision states: "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

[431] See, in particular, Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331, preambular para. 3, article 26; article 31, para. 1; article 46, para. 2; and article 69, para. 2, lit b); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 21 March 1986, A/CONF.129/15, preambular paragraph 3; article 26; article 31, para. 1; article 46, para. 3; article 69, para. 2, lit. b); United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, United Nations, *Treaty Series*, vol. 1834, No. 31363, p. 3, articles 105, 157, para. 4, and 300; and Convention on the Law of the Non-Navigational Uses of International Watercourses, New York, 21 May 1997, A/51/869, article 3, para. 5; article 4, para. 2; article 8, para. 1; article 17, para. 2; article 31; article 33, para. 8.

[432] *See*, in particular, General Assembly resolution 2625 (XXV), 24 October 1970, Annex: Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States adopted by the General Assembly in 1970, preamble, lit. b) and f), and operative part ("*The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter* – [...] Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law. Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law."); General Assembly resolution 56/83, 28 January 2002, Responsibility of States for internationally wrongful acts, Annex, article 52, para. 4; Rio Declaration on Environment and Development (1992), Principles 19 and 27; and draft articles on prevention of transboundary harm from hazardous activities, adopted by the International Law Commission at its fifty-third session (2001), Report of the International Law Commission on the work of its fifty-third session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), chap. V.E.1, articles 4, 14 and 1.

[433] "A principle which has, however, been invoked by the Court, and is of overriding importance, is that of good faith. ... The significance of this principle touches every aspect of international law." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Intro. & Part 1), 1996, p. 38 (citation omitted). See also Guy S. Goodwin-Gill, "State Responsibility and the 'Good Faith' Obligation in International Law", *in* Malgosia Fitzmaurice and Dan Sarooshi, (eds.), *Issues of State Responsibility before International Judicial Institutions*, vol. 7, Oxford and Portland Oregon, HART Publishing, 2004, pp. 75-104, at p. 85; and Hugh Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989", *The British Yearbook of International Law*, vol. 60, 1989, pp. 1-158, at pp. 7-29.

[434] "The Court observes that the principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969. It was mentioned as early as the beginning of this century in the Arbitral Award of 7 September 1910 in the *North Atlantic Fisheries case (United Nations, Reports of International Arbitral Awards*, vol. XI, p 188). It was moreover upheld in several judgments of the Permanent Court of International Justice *(Factory at Chorzow, Merits, Judgment No 13, 1928, PCIJ, Series A*, No 17, p 30; *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, PCIJ, Series A*, No 24, p 12 and 1932, *PCIJ, Series A/B*, No 46, p 167). Finally, it was applied by this Court as early as 1952 in the case concerning *Rights of Nationals of the United States of America in Morocco (Judgment, ICJ Reports*, 1952, p 212), then in the case concerning *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), (Jurisdiction*

Tests Case, the Court emphasized the importance of the principle of good faith as a basic principle governing the creation and performance of all legal obligations as follows:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential."[435]

213. In the *Border and Transborder Armed Actions Case,* the Court confirmed the importance of the principle of good faith while at the same time noting that "it is not itself a source of obligation where none would otherwise exist."[436]

214. In the *Military and Paramilitary Activities in and against Nicaragua Case*, the Court considered the immediate termination of a declaration with indefinite duration as inconsistent with the principle of good faith:

> "The right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity".[437]

215. In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area Case*, a Chamber of the Court also considered that the concepts of acquiescence and estoppel follow from the fundamental principles of good faith and equity:

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of the Court, Judgment, ICJ Reports, 1973, p 18), the *Nuclear Tests* cases *(ICJ Reports,* 1974, pp 268 and 473), and the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras) (Jurisdiction and Admissibility, Judgment, ICJ Reports,* 1988, p 105)." *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria),* Preliminary Objections Judgment, 11 June 1998, ICJ Reports, 1998, para. 38.

[435] *Nuclear Tests (Australia v. France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 268, at para. 46. "Both doctrine and jurisprudence recognize that the recourse to the notion of good faith takes place at the creation and the execution of all international juridical obligations.", Elisabeth Zoller, *La Bonne Foi en Droit International Public*, No. 28, Paris, Editions A. Pedone, 1977 (English summary pp. ix-xxvi, at p. x) (see also original French, section 34).

[436] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras) Jurisdiction and Admissibility,* Judgment of 20 December 1988, *I.C.J. Reports 1988*, p. 69, at para. 94. "Spirit of loyalty, sincerity, honesty, good faith is not the basis of a juridical obligation. There is no juridical obligation of good faith in international law. Good faith might only be a veritable juridical principle if a normative and positive content could be attributed to it. However, good faith may not serve as a philosophical foundation for the binding force of the promise in international law, nor can it found juridically the obligation to respect the legitimate beliefs of other." Elisabeth Zoller, note 425 above, p. xxvi (see also French original, sections 347-350).

[437] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment of 26 November 1984, I.C.J. Reports 1984, p. 420, para. 63.

> "The concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion."[438]

216. The principle of good faith has also been referred to in many decisions of the Dispute Settlement Body of *The World Trade Organization*.[439] In its decision on *European Communities – Trade Description of Sardines*, the Appellate Body stated that presumption is in favour of the existence of good faith:

> "Peru argues that a Member may not respond fully or adequately to a request for information under Article 2.5, and that, therefore, it is inappropriate to rely on this obligation to support assigning the burden of proof under Article 2.4 to the complainant. We are not persuaded by this argument. We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda* articulated in Article 26 of the *Vienna Convention*. And, always in dispute settlement every Member of the WTO must assume the good faith of every other Member."[440]

217. The principle of good faith may limit the exercise of a discretionary right by a State, such as the right of expulsion, as discussed below:

> "Whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which means that it must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interests of others. But since discretion implies subjective judgment, it is often difficult to determine categorically that the discretion has been abused. Each case must be judged according to its particular circumstances by looking either at the intention or motive of the doer or the objective result of the act, in the light of international practice and human experience. When either an unlawful intention or

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[438] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984, p. 305, para. 130.

[439] See United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R of 12 October 1998, para. 158; United States-Tax Treatment for "Foreign Sales Corporations", WT/DS108/AB/R of 24 February 2000, para. 166; United States-Safeguard Measures on Import of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R, WT/DS178/AB/R of 1 May 2001, para. 115; Thailand-Anti-Dumping on Angles Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, WT/DS122/AB/R of 12 March 2001, para. 79; and European Communities-Trade Description of Sardines, WT/DS231/AB/R/of 26 September 2002, para. 278.

[440] *European Communities-Trade Description of Sardines*, WT/DS231/AB/R/of 26 September 2002, para. 278 (citations omitted).

design can be established, or the act is clearly unreasonable, there is an abuse prohibited by law."[441]

218. The obligation of good faith in relation to the international movement of persons and the treatment of aliens as a matter of international law has been described as follows:

> "States have the right to regulate the movement of persons across borders and they may impose different restrictions on that movement. Only regulations which have been properly adopted, in accordance with a legislative authorization, should be applied; and in applying the regulations, the authorities should act in good faith. The application of municipal law concerning the movement of persons across national borders, especially in relation to aliens, always has an international aspect, and international law requires that each State comply with its international obligations in good faith."[442]

219. The principle of good faith may be relevant to the exercise by a State of its right to expel aliens in various ways.[443] First, the principle of good faith may be relevant to the requirement of a justification or reasonable cause for the exercise by a State of its right to expel an alien.

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[441] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, Grotius Publications Limited, 1987, pp. 133-134 (citation omitted).

[442] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 23. "The principle of good faith requires that a State contemplating action within the area of its sovereign authority, for example, in controlling the movement of persons, must ensure that its actions are compatible with its international obligations. Good faith regulates the area between the permissible and the clearly impermissible. The mere fact that a certain matter falls within the sovereign competence of the State does not imply unfettered discretion. Certain things may not be done, even in pursuit of the 'legitimate aim' of migration management, and the principle of good faith requires that the actions of the State are consistent with its other obligations under international law" ("For example, shooting people or deliberately sinking boats suspected of carrying illegal migrants.") Guy S. Goodwin-Gill, note 433 above, p. 100 and n. 97.

[443] "The application of municipal law concerning the movement of persons across national borders, especially in relation to aliens, always has an international aspect, and international law requires that each State comply with its international obligations in good faith ... However, the right to expel or deport ... must be exercised in conformity with generally accepted principles of international law...and the applicable international agreements... Consequently, in exercising the right to expel or deport, a State must observe the requirements of due process of law ...; its officials must not act arbitrarily or abuse the powers granted to them by their national law, and in all instances they must act reasonably and in good faith." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 23, 89. "It is submitted that the principle [of good faith] thus requires the State to identify in good faith the actual circumstances and interests affected by its proposed action; to select the course of action to be adopted in good faith; to ensure that policies and practices are implemented in a manner compatible with the letter and spirit of international obligations that bind the State; to define in good faith the scope of its policies and practices so as not to apply them in such a way as to cause damage to the rights and lawful interests of other subjects of international law, including protected persons; and to refrain from or avoid abuse of rights." Guy S. Goodwin-Gill, note 433 above, pp. 100-101. "In all the above cases, however, this

> "The insistence upon justification or reasonable cause which is so clearly common to these different cases emphasizes again the manner in which the competence to expel may be substantially confined; in this instance, by operation of the principle of good faith."[444]

220. Secondly, the principle of good faith may be relevant to the prohibition of the expulsion by a State for a motive or purpose other than expulsion in terms of the removal of an alien from its territory whose presence is contrary to its interests.[445]

> "From its function, it follows that the power of expulsion must not be 'abused'. If its aim and purpose are to be fulfilled, the power must be exercised in good faith and not for some ulterior motive, such as genocide, confiscation of property, the surrender of an individual to persecution, or as an unlawful reprisal."[446]

221. As early as 1892, the *Règles internationales sur l'admission et l'expulsion des étrangers* adopted by the Institut de Droit international recognized that an expulsion may be rendered unlawful if it is undertaken for the ulterior motives or purposes of personal gain, preventing legitimate competition or halting a just claim, action or appeal.[447] The draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School in 1961, recognized that an expulsion may be prohibited if it is undertaken for the purpose of depriving an alien of his existing means of livelihood under certain circumstances.[448] This would seem to suggest that the

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right [to expel aliens], discretionary though it is, must be exercised in good faith. It must not be arbitrary, nor accompanied by unnecessary indignity or hardship." Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* Cambridge, Grotius Publications Limited, 1987, pp. 133-134 (citations omitted).

[444] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 233. Relevant cases are examined below.

[445] "In particular, the power of expulsion must be exercised in good faith and not for an ulterior motive." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 499. *See also* Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* Cambridge, Grotius Publications Limited, 1987, p. 36 (citation omitted).

[446] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 307-308. Goodwin-Gill discusses the principle of good faith in relation to "confiscatory expulsion" as follows: "It is clear that the intention to expropriate without compensation because it denies the essential function of expulsion, may also deny to that act the character of a *bona fide* exercise of discretion." Ibid., at p. 216.

[447] "Deportation must never be ordered for personal gain, to prevent legitimate competition or to halt a just claim or an action or appeal that has been filed in the proper manner with the courts or competent authorities." *Règles internationales*, note 56 above, article 14 [French original].

[448] Draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School, 1961, reproduced in *Yearbook of the International Law Commission*, 1969, vol. II, p. 145. Article 11 (Deprivation of means of livelihood) provides as follows:

ulterior motive or purpose must be unlawful in order to render an expulsion in violation of the principle of good faith. This may be a relevant factor to consider in determining the lawfulness of an expulsion which constitutes a disguised extradition.[449]

222. Thirdly, the principle of good faith may be relevant in determining the factors to be weighed by a State in deciding whether to exercise its right to expel an alien.

> "The principle of good faith and the requirement of justification, or 'reasonable cause', demand that due consideration be given to the interests of the individual, including his basic human rights, his family, property, and other connections with the State of residence, and his legitimate expectations. These must be weighed against the competing claims of 'ordre public'."[450]

223. The principle of good faith as it applies to the expulsion of aliens does not necessarily mean that the State of nationality of the alien who is subject to expulsion would reach the same conclusion in determining whether the continuing presence of the alien is contrary to the interests of the territorial State.

> "Expulsion may savor of an abuse of power if the decision to expel be not founded on a *bona fide* belief as to the evil effect upon the State of the continued presence of the individual within its domain. A conclusion in favor of expulsion need not necessarily coincide with one to which the State of which the alien is a national would, under like circumstances, assent. On the other hand, a decision to expel must not be one which no State could in good faith be reasonably expected to reach."[451]

"1. To deprive an alien of his existing means of livelihood by excluding him from a profession or occupation which he has hitherto pursued in a State, without a reasonable period of time in which to adjust his affairs, by way of obtaining other employment, disposing of his business or practice at a fair price, or otherwise, is wrongful if the alien is not accorded just compensation, promptly paid in the manner specified in Article 39, for the failure to provide such period of adjustment.

2. Paragraph 1 of this Article has no application if an alien:

(a) has, as a result of professional misconduct or of conviction for a crime, been excluded from a profession or occupation which he has hitherto pursued, or

(b) has been expelled or deported in conformity with international standards relating to expulsion and deportation and not with the purpose of circumventing paragraph 1."

[449] *See* Part VII.A.8.

[450] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 262.

[451] Charles Cheney Hyde, *International Law; Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 230 (citation omitted).

224. Thus, a State has a wide margin of appreciation in determining whether there are grounds for concluding that the continuing presence of an alien is contrary to its interests. For this reason, there may be *practical* problems with respect to the burden of proof in asserting a claim based on a violation of the principle of good faith in relation to the expulsion of aliens.

> "[A]n expulsion which is not executed in good faith may be a breach of the obligations of the acting State. Of course, the principle of good faith in international law is advantageously presumptive, and it will never be very easy to establish *mala fides* on the part of the expelling State. … State practice admits of a considerable margin of appreciation in such matters."[452]

225. There may also be some hesitation on the part of a State to base its claim on a violation of the principle of good faith which is fact an assertion of bad faith on the part of the other State.[453]

226. Fourthly, the principle of good faith may be relevant to consider with respect to procedural guarantees in expulsion cases and the implementation of an expulsion order. In the *Case of Conka*, the European Court of Human Rights was confronted with a situation where a State had consciously mislead a group of aliens about the purpose of a notice in order to make it easier to deprive them of their liberty with a view to ensuring the effectiveness of a planned operation for their expulsion. The Court, which was called upon to decide the case based on the provisions of the European Convention on Human Rights, found that such an attitude was contrary to article 5 thereof, protecting the right to liberty and security. The Court stated as follows:

> "… even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5 [of the European Convention on Human Rights]."[454]

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[452] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 206 (citations omitted). "Even if a State is reasonably convinced of the bad faith of another State, the presumptions in favour of good faith and law-abidingness impose such a heavy burden of proof on any claimant that this line of argument is but rarely advisable." Georg Schwarzenberger, *International Law and Order*, London, Stevens & Sons, 1971, p. 88.

[453] "Because of the grave implications of a charge of bad faith in international law, it is rarely made by states against each other. To say, however, that an action has not been taken in good faith implies no more than that there has been some element of bad faith." B. O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, pp. 47-92, at p. 51 (citation omitted). "Yet, in part, the difficulty lies in the nature of any allegation of bad faith and abuse of rights by other States. The suggestion of bad faith is highly odious." Georg Schwarzenberger, *International Law and Order*, London, Stevens & Sons, 1971, p. 88 (referring to Memorandum by W. Pennell, British Commissary Judge of the British-Brazilian Anti-Slavery Mixed Arbitral Tribunal, November 4, 1830 (19 B.F.S.P., p. 460); Judge Lauterpacht's Sep. Op. in the *Case of Certain Norwegian Loans* (France/Norway), *I.C.J. Reports 1957*, p. 9, and his Diss. Op. in the *Interhandel Case* (Switzerland/U.S.A.), ibid., *1959*, p. 111).

[454] European Court of Human Rights, *Case of Conka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application number 51564/99, para. 42.

3. The prohibition of arbitrariness

227. The prohibition of arbitrary action may limit the exercise of a right which entails a broad measure of discretion.

> "Expressions such as 'discretion' are designed to convey the broad authority of a government to determine how a specified situation should be treated, whereas phrases containing the word 'arbitrary' indicate that there is a limit to an official's discretion and that an arbitrary action constitutes in fact an abuse of that discretion. The rules thus define both the powers of a State and the limits of its authority, and provide protection to an individual against the abuse of that authority."[455]

228. The International Court of Justice has described arbitrary action by a State in terms of "a wilful disregard of due process" and as contrary to "a sense of juridical propriety". The Court stated as follows:

> "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' (*Asylum, Judgment, I.C.J. Reports 1950,* p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety".[456]

229. The prohibition of arbitrary action is generally recognized as a limitation on the right of a State to expel aliens.[457] The arbitrary action of a State may occur in relation to the decision to expel a

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[455] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. ix-x.

[456] *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy), Judgment, I.C.J. Report 1989*, p. 65, para. 128. See also p. 63, para. 124 of the same judgement: "To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication."

[457] "On the other hand, while a state has a broad discretion in exercising its right to expel aliens, its discretion is not absolute. Thus, by customary international law it must not abuse its right by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I -- Peace (Parts 2 to 4), 1996, p. 940. "In all the above cases, however, this right [to expel aliens], discretionary though it is, must be exercised in good faith. It must not be arbitrary, nor accompanied by unnecessary indignity or hardship." Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* Cambridge, Grotius Publications Limited, 1987, p. 36 (citations omitted). "Arbitrary expulsions either without any or on insufficient cause, or in violation of the provisions of municipal law or of a treaty, or under harsh or violent circumstances unnecessarily injurious to the person affected have given rise to diplomatic claims and to awards by arbitral commissions." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1915, p. 57. "Thus, in so far as a State has a right arbitrarily to exclude an alien, that

particular alien, the procedure followed in the adoption of the decision or the manner in which the expulsion decision is implemented.[458]

> "Thus arbitrary action, either in the choice of the individual expelled, or in the method of expulsion, would indicate an abuse of power and point to internationally illegal action … As a matter of fact, arbitrariness in the methods applied in the particular case, rather than in the choice of the individual concerned or in the determination to expel him, usually constitutes the chief cause of foreign complaint, and is commonly an element to be found in the cases where the conduct of the territorial sovereign is subjected to sharpest criticism."[459]

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right is not matched by a corresponding discretionary competence to expel him arbitrarily." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 460. "The obligations of a State which stem from its participation in the international community, as well as humanitarian reasons, have been quoted by many international law experts in support of declaring arbitrary expulsion to be contrary to international law." United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955 (ST/SOA.22 and Corr.2 (replaces Corr.1)), para. 105 (citing Charles de Boeck, *L'expulsion et les difficultés internationales qu'en soulève la pratique*, Académie de Droit International, Recueil des Cours, 1927, III (Paris, 1928); Philip C. Jessup, *A Modern Law of Nations, An Introduction* (New York, 1949), pp. 82-83; A. Kobarg, *Ausweisung und Abweisung von Auslaendern;* J. M. Landis, "Deportation and Expulsion of Aliens", Encyclopedia of the Social Sciences, vol. 5, New York, 1948, pp. 95-98; A. de Lapradelle and J. P. Niboyet, *Répertoire de Droit International* (Paris, 1930), VIII, 29-31; J.-P. Niboyet, *Traité de droit international privé français*, Vol. II, *La Condition des étrangers* (Paris, 1951), pp. 131-132; L. Oppenheim, *International Law, A Treatise*, ed. H. Lauterpacht (London, 1952), I, pp. 632-633; N. Politis, *Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux*, Académie de Droit International, *Recueil des Cours*, 1925 (Paris, 1926), I, pp. 101-108; Georges Scelle, *Précis de droit des gens, Principes et systématique*, 2nd part (Paris, 1930, PP. IOWIO9; and Marcel Sibert, *Traité de droit international public* (Paris, 1951), I, pp. 620-627). See also Amos S. Hershey, *The Essentials of International Public Law and Organization*, rev. ed., New York, The Macmillan Company, 1927, pp. 374; D. P. O'Connell, *International Law*, vol. 2, 2nd ed., London, Stevens & Sons, 1970, vol. 2, p. 707; B.O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, pp. 47-92, pp. 47-92, at p. 85; Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 89.

[458] "[U]nder generally accepted principles of international law, a state may expel an alien whenever it wishes, provided it does not carry out the expulsion in an arbitrary manner, such as by using unnecessary force to effect the expulsion or by otherwise mistreating the alien or by refusing to allow the alien a reasonable opportunity to safeguard property." David John Harris, *Cases and Materials on International Law*, 4th ed., London, Sweet & Maxwell, 1991, p. 503 (quoting Dr. Breger's case, Letter from U.S. Dept. of State to Congressman, 1961, 8 Whiteman 861).

[459] Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, pp. 230-231 (citations omitted). It has also been suggested that the expulsion of an alien for a reason, function or purpose other than that for which it is intended would constitute arbitrary action. "When arbitrary use of powers or a *détournement de pouvoir* is alleged, proof should also be brought that the right has been used in disregard of the purpose for which it was originally intended." Alexandre Kiss, "Abuse of Rights", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 4-8, at p. 8. See also Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 208.

230. The discretionary nature of the right of a State to expel aliens may make it difficult to establish the arbitrary character of an expulsion.[460] The Iran-United States Claims Tribunal has recognized the unlawfulness of an arbitrary expulsion. It has also held that the claimant has the burden of proving the wrongfulness of the expulsion. In the *Rankin vs. The Islamic Republic of Iran* case, the Tribunal stated as follows: "A claimant alleging expulsion has the burden of proving the wrongfulness of the expelling State's action, in other words that it was arbitrary, discriminatory, or in breach of the expelling State's treaty obligations."[461]

231. The failure of a State to give any reason for the expulsion of an alien may be viewed as evidence of arbitrary action.

> "The need for the expelling state not to act arbitrarily, especially in the case of expulsion of an alien who has been residing in the expelling state for some length of time, and has established his means of livelihood there, justifies the home state of the expelled individual, by virtue of its right of protection over nationals abroad, in making diplomatic representations to the expelling state, and asking for the reasons for the expulsion. While the failure of a state to advance any reason for the expulsion may not itself be a breach of any international legal obligation, the refusal to give reasons may lend support to a finding of arbitrariness in the expulsion. If it does give reasons, any scrutiny of them, and the evidence supporting them, is (unless it is a question of establishing that specific conditions laid down by treaty have been met) probably to be limited to establishing that they are *prima facie* sufficient

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[460] "The borderline between discretion and arbitrariness, although elastic, is nevertheless a real one, and in case of doubt it is for an impartial organ to determine whether it has been overstepped." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 941. "In 1966, Her Majesty's Government set out the principles which govern the decision whether or not to make representations regarding the expulsion of United Kingdom citizens from Commonwealth countries: 'We ... reserve the right to make representations to any Commonwealth Government in any individual case if the manner in which the power ... is exercised causes hardship, or seems to be arbitrary or unjust ... This is different from representations, which we cannot make, concerning the operation of the laws of a country perfectly correctly according to their concept of their laws.'" Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States,* Oxford, Clarendon Press, 1978, p. 208 (quoting 733 H. C. Deb., cols. 1223-5, quoted in *British Practice,* 1967, pp. 112-14). "There is significant scope for States to enforce their immigration policies and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may not be exercised arbitrarily. A State might require, under its laws, the departure of persons who remain in its territory longer than the time allowed by limited-duration permits. Immigrants and asylum-seekers, even those who are in a country illegally and whose claims are not considered valid by the authorities, should not be treated as criminals." The rights of non-citizens, Final report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council Decision 2000/283, E/CN.4/Sub.2/2003/23, 26 May 2003, para. 29, (citations omitted). "Thus in cases concerning the expulsion of aliens, an international tribunal would normally accept as conclusive the reasons of a serious nature adduced by the State as justifying such action. It would, however, regard as unlawful measures of expulsion those which are arbitrary ..." Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* Cambridge, Grotius Publications Limited, 1987, p. 133.

[461] *Rankin v. The Islamic Republic of Iran,* note 136 above, p. 142, para. 22.

> to negate any presumption of arbitrariness: particularly where interests of national security are concerned, a meticulous scrutiny of the reasons for a state's decision would be inappropriate."[462]

232. As early as 1903, the Umpire who delivered the arbitral award in the *Paquet Case* referred to the "general practice amongst governments" according to which expelling States give explanations to the State of nationality of the individual expelled. The Umpire found that Venezuela's refusal to give any explanations in relation to the expulsion of Mr. Paquet revealed the arbitrary character of that measure.

> "... on the other hand, the general practice amongst governments is to give explanations to the government of the person expelled if it asks them, and when such explanations are refused, as in the case under consideration, the expulsion can be considered as an arbitrary act of such a nature as to entail reparation ... "[463]

233. Article 13 of the International Covenant on Civil and Political Rights by its terms governs the procedural but not the substantive requirements for a lawful expulsion. This provision does require that the expulsion of an alien be carried out pursuant to a decision in accordance with municipal law. The Human Rights Committee has interpreted this provision as a prohibition of arbitrary expulsions notwithstanding the absence of any explicit provision to that effect. In its General Comment No. 15, the Human Rights Committee stated as follows:

> "Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out 'in pursuance of a decision reached in accordance with law', its purpose is clearly to prevent arbitrary expulsions."[464]

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[462] Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 943-944 (citations omitted). See also *Bandali v. Governor-General of the Belgian Congo,* Conseil d'État, 17 November 1950, *International Law Reports*, 1950, H. Lauterpacht (ed.), Case No. 78, pp. 257-258, at p. 258 "Without a statement of the reasons for the expulsion she would be at the mercy of an arbitrary decision. Such a statement is moreover required by Article 14 of the ordinance of 8 March 1922. It is thus a formality which is essential for the validity of the expulsion order."

[463] *Paquet Case (Expulsion),* Mixed Claims Commission Belgium-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. IX, pp. 323-325, at p. 325.

[464] Human Rights Committee (International Covenant on Civil and Political Rights), General Comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, para. 10. Parvez Hassan analyzes the meaning of the term "arbitrary" or "arbitrarily" as used in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. He concludes that these terms have a special meaning based on the negotiating history of the two documents: "the reason for the use of the words 'arbitrary' or 'arbitrarily' was to protect individuals from both 'illegal' and 'unjust' acts." He refers to the preamble of the Declaration as indicating that the essential purpose of the Declaration was "to proclaim the inherent dignity and inalienable rights of all human beings and that this could only be accomplished by limiting the 'legal' discretion of governments." Parvez Hassan, "The Word 'Arbitrary' As Used In The Universal Declaration Of Human Rights: 'Illegal' or 'Unjust'?", *Harvard International Law Journal,* vol. 10, 1969, pp. 225-262, at pp. 254, 259.

234. The European Court of Human Rights considered the prohibition of arbitrary expulsions in relation to the protection of family life under article 8 of the European Convention on Human Rights.[465] The Court dismissed the claim after finding that the applicant's expulsion had not been arbitrary, unreasonable or disproportionate to legitimate aims.

> "[Given the circumstances] …there is nothing to indicate that the Belgian authorities acted in an arbitrary or unreasonable manner, or failed to fulfil their obligation to strike a fair balance between the relevant interests. The applicant's expulsion cannot therefore be regarded as disproportionate to the legitimate aims pursued".[466]

235. The Parliamentary Assembly of the Council of Europe has indicated that the expulsion of aliens in situations in which a request for extradition would have been more appropriate is arbitrary and unsatisfactory. "Noting that, in certain instances, criminals have been expelled to a country which might otherwise have made a request for extradition, but that such expulsion procedure is arbitrary and therefore unsatisfactory ...".[467]

236. The International Law Commission considered the notion of arbitrary in distinguishing lawful deportations from similar action which may constitute a crime against humanity. The Commission distinguished between these two situations based on the existence of "legitimate reasons" for the deportation.[468]

237. Article 7, paragraph 1 (d) of the Rome Statute for the International Criminal Court considers "deportation or forcible transfer of population" as a crime against humanity when it is committed "as part of a widespread or systematic attack against any civilian population, with knowledge of the

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[465] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Rome, 4 November 1950, *European Treaty Series*, No. 5 [sometimes referred to as European Convention on Human Rights]. Goodwin-Gill makes the following observation with respect to the European Convention on Human Rights: "The fundamental assumption throughout the Convention is that discretionary powers are subject to control, and that State actions which are arbitrary, in that they are inspired by bad faith or otherwise reveal a 'détournement de pouvoir', may be challenged." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 292.

[466] European Court of Human Rights, *Case of C. v. Belgium*, Judgment (Merits), 7 August 1996, Application number 21794/93, para. 36.

[467] Council of Europe, Parliamentary Assembly, Recommendation 950 (1982) on extradition of criminals, 1 October 1982, para. 8.

[468] Article 18, paragraph (g) reads as follows: "A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group … (g) arbitrary deportation or forcible transfer of population." The commentary states as follows: "The term 'arbitrary' is used to exclude the acts when committed for legitimate reasons, such as public health or well being, in a manner consistent with international law." International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind (1996), article 18, paragraph (g), and Commentary (13), *Yearbook of the International Law Commission*, 1996, vol. II, Part Two, A/51/10.

attack."[469] The list of elements for this crime includes the following: The perpetrator deported forcibly without grounds under international law one or more persons to another State or location by expulsion or other coercive acts; such persons were lawfully present in the area from which they were removed; and the perpetrator was aware of the factual circumstances that established the lawfulness of such presence.[470]

238. The prohibition of arbitrary expulsion has also been considered by the national courts of some States.[471] An early case involving the expulsion of an American national from Venezuela was described as arbitrary because the expulsion was carried out before the trial of the case and the individual was expelled without being given an opportunity to see his family or make business arrangements.

> "Arbitrary action is, as has been observed, frequently apparent in the method by which expulsion is effected. That once applied by a certain State in the case of one Hollander, an American citizen, is illustrative. Having been arrested February 8, 1889, on a charge of calumny and forgery, Hollander was held in custody until May 14, following, when, before the

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[469] Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, at p. 93.

[470] Elements of Crimes, Assembly of States Parties to the Rome Statute of the International Criminal Court, Official Records: First Session, New York, 3-10 September 2002, 108 Doc. ICC-ASP/1/3, at p. 118, Article 7, para. 1, lit. d.

[471] See, e.g., *The Japanese Immigrant Case*, United States Supreme Court, 189 U. S. 86 (6 April 1903), at p. 101: "Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized." "The first question is what standard should be adopted with respect to the Minister's decision that a refugee constitutes a danger to the security of Canada [and thus subject to deportation]. We agree with Robertson JA that the reviewing court should adopt a deferential approach to this question and should set aside the Minister's discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion." *Suresh v. Canada (Minister of Citizenship and Immigration and Others)*, Supreme Court, 11 January 2002, *International Legal Materials*, volume 41, 2002, pp. 954-986, at para. 29, *International Law Reports*, volume 124, E. Lauterpacht, C.J. Greenwood, A.G. Oppenheimer (eds.), pp. 343-384, at p. 354. "The plaintiffs contention that his expulsion contravenes the rule of equality must be dismissed. In the same manner in which the police of the District authorities in Lorrach [in the case of N., the plaintiffs principal joint-accused] had exercised their discretionary power, so the defendant was entitled to exercise his discretionary power. As desirable as it might be to have an homogeneous application of the *AuslG* in all the different *Länder* [States] of the Federal Republic of Germany, the equality rule contained in Article 3 of the Basic Law merely obliges the authorities not to exercise their discretion in an arbitrary manner. Thus there is no need to examine whether the cases of N. and the plaintiff are comparable." *Expulsion Order Case*, Federal Republic of Germany, Supreme Administrative Court of Hesse, 13 November 1968, *International Law Reports*, volume 61, E. Lauterpacht (ed.), C.J. Greenwood, pp. 436-443, at p. 442 (citations omitted).

trial of the case, he was expelled from the country by executive decree, and without opportunity to see his family or make any business arrangements."[472]

239. While the prohibition of the arbitrary expulsion of aliens appears to be well established under international law, the type of conduct by a State which may characterize an expulsion as such is quite varied.

4. Treatment of aliens

240. The treatment of aliens is a subject of international law which has undergone major changes in theory and practice over the centuries.[473] The development in the law and practice relating to the treatment of aliens has occurred with respect to the standard for the treatment of aliens as well as the procedure for addressing alleged violations of this standard. Since as early as the seventeenth century, the treatment of aliens was subject to the standard of "denial of justice". By the twentieth century, the treatment of aliens became the subject of two competing theories which were a source of significant controversy,[474] namely, the national standard and the international minimum

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[472] Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 232 (citations omitted). "In commenting on this case Mr. Olney, Secy. of State, said: 'After deliberating three months and more, with Hollander absolutely in its power, the executive authority expelled him in a manner that defeated the course of justice in the courts of the country; that violated the rules of international law and the existing provisions of the treaty, contrary to the practice of civilized nations.'" Ibid., p. 232, n. 1 (quoting Communication to Mr. Young, Guatemala, Jan. 30, 1896, For. Rel. 1895, II, 775, 779, Moore, Dig., IV, 102, 108).

[473] "The treatment of aliens under international law has undergone vast changes, in theory as well as practice, over the centuries." Richard B. Lillich, "Duties of States Regarding the Civil Rights of Aliens", *Recueil des cours de l'Académie de droit international*, vol. 161, 1978-III, pp. 329-443, at p. 343. "The position of aliens at no time depended entirely on treaty obligations. There has never been, and is still today, no duty in general international law to admit aliens into one's territory. But *once* they have been admitted they are to be treated according to the principles and rules which general international law has developed in the course of history." Hermann Mosler, "The International Society as a Legal Community", *Recueil des cours de l'Académie de droit international*, vol. 140, 1976-iv, pp. 1-320, at pp. 71-72 (citation omitted). "The law of the treatment of aliens, as a part of international law, lacks uniformity, not only with regard to the rules of positive law, but still to a greater extent as regards the fundamental concepts underlying its structure." Andreas Hans Roth, note 19 above, p. 61.

[474] "The standard of treatment to be accorded to foreign nationals continues to be a fruitful source of conflict and controversy. In the past, much was made of the difference between what was commonly described as the international minimum standard on the one hand, and the standard of national, or equal, treatment, on the other hand. The 'international minimum standard' was known by a variety of names, which included the 'standards of the more advanced States', the 'ordinary standards of justice', the 'standard of civilized justice', and so forth … The origins of the standard may be found in the practice of the economically more powerful nations of Western Europe which, together with the United States of America, were most interested in securing the position of their nationals abroad. Not only did these States apply the standard between themselves, but they sought also to impose it upon other nations, particularly those with less well developed or inefficient judicial and administrative systems. The reaction which duly followed expressed itself in the doctrine of the equality of treatment of nationals and aliens, and in the contention that aliens could not acquire, through any principle of international law, a position more privileged than that of nationals." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 58 (citation omitted). "The

standard.[475] Some authors have criticized both theories as providing inadequate solutions to the legal problems that may arise as a result of the presence of aliens in the territory of a State.[476] The evolving law and practice with respect to the procedure for redressing the mistreatment of aliens has included private reprisals,[477] diplomatic protection[478] and State responsibility[479] for injuries to aliens.

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controversy concerning the national and international standards has not remained within the bounds of logic, and this is not surprising, as the two viewpoints reflect conflicting economic and political interests. Thus those supporting the national treatment principle are not necessarily committed, as is sometimes suggested, to the view that municipal law has supremacy over international law. It is possible to contend that, as a matter of international law, the standard of treatment is to be defined in terms of equality under the local law. Protagonists of national treatment point to the role the law associated with the international standard has played in maintaining a privileged status for aliens, supporting alien control of large areas of the national economy, and providing a pretext for foreign armed intervention. The experience of the Latin American states and others dictates extreme caution in handling the international standard, but it is necessary to distinguish between, on the one hand, the question as to the content of the standard and the mode of application and, on the other hand, the core principle, which is simply that the territorial sovereign cannot in all circumstances avoid responsibility by pleading that aliens and nationals had received equal treatment." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 503 (citations omitted).

[475] "Within the broad, historic development of this unique customary international law for the protection of aliens, two different standards about the responsibility of states, both of which purport to include a norm prohibiting discrimination against aliens, have competed for general community acceptance. One of these standards is described as the doctrine of 'national treatment' or 'equality of treatment' and provides that aliens should receive equal, and only equal, treatment with nationals. The second standard is described as that of a 'minimum international standard' and specifies that, however a state may treat its nationals, there are certain minima in humane treatment that cannot be violated in relation to aliens. A review of the flow of decision and communication in development of the customary law about aliens, and especially in the recent, more general prescriptions about human rights, will establish, it is believed, that the second of these standards has become present general community expectation." Myres S. McDougal, Harold D. Lasswell and Lung-chu Chen, "The protection of aliens from discrimination and world public order: responsibility of states conjoined with human rights", *American Journal of International Law*, vol. 70, 1976, pp. 432-469, at pp. 443-444 (citations omitted).

[476] "Today neither the international minimum standard nor the doctrine of equal treatment provides an adequate solution to the problems raised by the presence of foreign nationals on a State's territory. While the international minimum standard is unconscionably vague, the doctrine of equal treatment tends to restrict the freedom of aliens to the same degree as that of nationals, and often to an extent which other States find unacceptable." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 62.

[477] "From this cursory examination of the history of the right of private reprisals, one may draw two conclusions about the law governing the treatment of aliens as it stood toward the end of the 18th century. First, by initially restricting and later actually refusing to grant letters of reprisal to aggrieved nationals, States had taken over most of what today would be called the claims settlement process … Second, using the system of reprisals, which came into play only upon a finding that a denial of justice had occurred, States had created, if only in the most rudimentary form, a body of principles governing what has come to be called State Responsibility for Injuries to Aliens." Richard B. Lillich, note 473 above, pp. 345-346 (citation omitted).

[478] "The substitution of diplomatic protection for private reprisals and the elaboration of norms governing the Responsibility of States for Injuries to Aliens that not only embraced but went well beyond the older denial of justice concept constituted a significant step forward by the international community." Ibid., p. 347.

[479] "A review of the development of the law concerning the treatment of aliens from the late 18th century until the First World War reveals, then, that what at the beginning of the period was no more than a primitive notion

(a) Denial of justice

241. The notion of "denial of justice" has been the subject of evolving State practice over the last few centuries.[480] It is a term that has been used to refer to a variety of situations[481] and has eluded general agreement as to its precise definition.[482] The broader view encompasses the unlawful

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of protecting nationals from denials of justice enforced through State-sanctioned private reprisals became, through the practice of States and the decisions of international and national claims commissions, a fairly sophisticated collection of customary international law norms - backed up by diplomatic protection -governing the Responsibility of States for Injuries to Aliens." Ibid., p. 352.

[480] "The fact that the treatises of Grotius and Vattel are quoted in some of the modern arbitration awards concerning denial of justice by no means implies that the origin of this doctrine is to be found in the works of these two writers. It is one of great antiquity, traces of which may be found in periods immediately following the migration of nations, although it is true that it did not exist at the time of Roman law." Hans W. Spiegel, "Origin and Development of Denial of Justice", *American Journal of International Law*, vol. 32, 1938, pp. 63-81, at p. 63. "The notion of denial of justice developed within Europe from the 13th century onwards." Stephan Verosta, «Denial of Justice», *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1007-1010, at p. 1007. "The expression 'denial of justice' is historically linked to the responsibility of states for injury done in their territory to the person or property of aliens, and in the Middle Ages, with the practice of private reprisals, being a condition of their legality." Eduardo Jiménez de Aréchaga, "International Responsibility", *in* Max Sørensen (ed.), *Manual of Public International Law*, New York, St. Martin's Press, 1968, 553-557, at p. 553.

[481] "The forms that the denial of justice may take are highly various. A denial of justice may be present in any abuse of the practice of a court in each phase of a legal procedure, e.g. the misuse of a declaration of the inadmissibility of some legal avenue, the determination that a tribunal is not competent to hear the issue, the transfer of an issue to another court, the irregular establishment of a court, or the unusual and inexcusable protraction of proceedings (*justicia protracta*)." Stephan Verosta, "Denial of Justice", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1007-1010, at p. 1008. "The term 'denial of justice' has been employed by claims tribunals so as to be coextensive with the general notion of state responsibility for harm to aliens, but it is widely regarded as a particular category of deficiencies on the part of the organs of the host state, principally concerning the administration of justice. It has been pointed out that the term has been given such a variety of definitions that it has little value and the problems could be discussed quite adequately without it." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 506 (citations omitted).

[482] "To few terms in international law have such a wide variety of meanings or shades of meaning been attributed as to the term denial of justice." Gerald G. Fitzmaurice, "The Meaning of the Term 'Denial of Justice'", *British Year Book of International Law*, vol. 13, 1932, pp. 93-114, at p. 93. In 1927, the Institut de Droit International formulated the following rules:

"Article 5 – A State is responsible for denial of justice:

1. If the courts necessary for the protection of aliens either do not exist or do not function.

2. If the courts are not accessible to aliens.

3. If the courts do not offer the indispensable guarantees for a proper administration of justice."

"Article 6 – The State would be equally liable if the procedure or judgment constituted a manifest deficiency of justice, in particular if they were inspired by hostility against aliens as such or as nationals of a particular State." Institut de droit international, Responsabilite internationale des Etats à raison de dommages causés sur treatment of an alien by the executive, legislative or judicial authorities of a State. [483] The narrower view is limited to the misconduct or inaction by the judiciary resulting in a denial of due process to an alien in the administration of justice. [484] The usefulness of this standard has been questioned in view of more specific rules governing various aspects of the treatment of aliens, including the administration of justice. [485]

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leur territoire à la personne et aux biens des étrangers, *Annuaire de l'Institut de Droit international*, vol. 33-III, 1927, p. 330, at pp. 331-332 [French original].

[483] "In its broader acceptation it signifies any arbitrary or wrongful conduct on the part of any one of the three departments of government - executive, legislative, or judicial. The term includes every positive or negative act of an authority of the government, not redressed by the judiciary, which denies to the alien that protection and lawful treatment to which he is duly entitled." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, at p. 330. "An even broader view is propounded by others who apply the term to any form of internationally unlawful treatment of aliens ... The meaning of the term 'denial of justice' should not be employed as a method of restricting or enlarging the scope of the responsibility of the state. The obvious objection is that denial of justice and state responsibility are not co-extensive expressions, and that state responsibility for acts of the judiciary does not exhaust itself in the concept of denial of justice." Eduardo Jiménez de Arechaga, "International Responsibility", *in* Max Sørensen (ed.), *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 553-557, at p. 555.

[484] "In its narrower and more customary sense the term denotes some misconduct or inaction of the judicial branch of the government by which an alien is denied the benefits of due process of law. It involves, therefore, some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, at p. 330. "It appears now to be possible to formulate the proposition that, whatever may be the precise definition to be given to denial of justice it ought at any rate to be one which limits the scope of the term to improper acts or omissions involving the responsibility of the state in some way connected with the administration of justice, whether on the part of the judiciary itself, or of some other organ of the state." Gerald G. Fitzmaurice, "The Meaning of the Term 'Denial of Justice'", *British Year Book of International Law*, vol. 13, 1932, pp. 93-114, at p. 98. "Any degree of familiarity with the materials of international law reveals the variety of meanings accorded to the phrase 'denial of justice' in the sources. The label itself does not give a sufficient indication of the basis of state responsibility asserted to exist: but the difficulties of nomenclature do not deny the reality of the particular and independent heads of liability. The present form involves breaches of an international standard of fair treatment by the judicial machinery itself." Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part I, Oxford, Clarendon Press, 1983, p. 72 (citation omitted). "A denial of justice *(justitia denegata, déni de justice, refus de justice, Rechts- und Justizverweigerung)* should be understood as any defect in the organization of courts or in the exercise of justice which entails a violation of the international legal duties of States with respect to the judicial protection of aliens. This applies not only to the ordinary court system but also to all other branches of justice, including the prize courts as well as administrative procedures." Stephan Verosta, "Denial of Justice", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1007-1010, at p. 1007. See also Clyde Eagleton, "Denial of Justice in International Law", *American Journal of International Law"*, vol. 22, 1928, pp. 538-559.

[485] "The term 'denial of justice' after having been severed from the legal consequence of reprisals, re-adopts its original meaning as a refusal to accord justice to a foreign subject. This restrictive interpretation is rivalled by another which includes in denial of justice every conceivable kind of international delict. But since in the

242. The Commission considered the notion of denial of justice in the context of its work on the topic of diplomatic protection. The Special Rapporteur for the topic, John Dugard, discussed the uncertainty both as to the content of the notion and its continuing relevance as follows:

> "He observed that the content of the notion of denial of justice was uncertain. At the beginning of the twentieth century, it had involved a refusal of access to the courts; Latin American scholars had included judicial bias and delay of justice, while others took the view that denial of justice was not limited to judicial action or inaction, but included violations of international law by the executive and the legislature. The contemporary view was that denial of justice was limited to acts of the judiciary or judicial procedure in the form of inadequate procedure or unjust decisions. However, it featured less and less in the jurisprudence and had been replaced to a large extent by the standards of justice set forth in international human rights instruments, particularly article 14 of the International Covenant on Civil and Political Rights."[486]

243. The Special Rapporteur decided not to further consider the notion of denial of justice since the prevailing view in the Commission was that it should not be part of the study of the topic.[487]

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meantime, *i.e.*, in the course of the last hundred years, the conception of illegality in international law has acquired a definite meaning, the wide interpretation of the term 'denial of justice' becomes superfluous. The question remains, however, whether the restricted interpretation according to which denial of justice is merely a refusal of protective justice becomes likewise superfluous. This question must be answered in the affirmative since, in course of time, other kinds of denial of justice besides the refusal to hear a case have become international delicts. Today the one and only important consideration is which particular kind of a failure to accord justice is in issue in a given case." Hans W. Spiegel, "Origin and Development of Denial of Justice", *American Journal of International Law*, vol. 32, 1938, pp. 63-81, at p. 79 (citation omitted). "Over the years various attempts have been made to fashion a 'narrow' definition of denial of justice but there seems to be little or no point in such exercises. Lissitzyn was correct in his view that: 'the determination of particular controversies has almost never depended upon the meanings attached to this term. In almost all cases the real question has always been whether or not a State was responsible internationally for a particular act or omission, and not whether such an act or omission can be called denial of justice.'" Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part I, Oxford, Clarendon Press, 1983, p. 73 (citations omitted) (quoting Oliver J. Lissitzyn, "The Meaning of the Term Denial of Justice in International Law", *American Journal of International Law*, vol. 30, 1936, pp. 632-646, at p. 645).

[486] International Law Commission, Report on the work of its fifty-fourth session (29 April-7 June and 22 July-16 August 2002), *General Assembly, Official Records, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 278 (citations omitted). For a discussion of denial of justice in relation to the exhaustion of remedies rule, *see* Diplomatic Protection, Second report by John Dugard, Special Rapporteur, A/CN.4/514, Corr.1 and Corr.2 (Spanish only), 28 February 2001.

[487] International Law Commission, Report on the work of its fifty-fourth session (29 April-7 June and 22 July-16 August 2002), *General Assembly, Official Records, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 274-279.

(b) National treatment

244. As early as the seventeenth century, bilateral commercial treaties provided for the treatment of aliens based on the standard of national treatment or treatment which was equal to that of citizens.[488] Support for the standard of national treatment continued in varying degrees throughout the centuries.[489] This standard appears to be based on the principles of territorial jurisdiction and equality.[490]

> "The doctrine of 'national treatment' or equality doctrine sums up the rules of treatment of aliens by saying that the international obligations of the State are discharged from the moment that it has put the alien on a footing of complete equality in everything pertaining to civil or private rights. This theory starts from the major postulate that the alien must accept the legal conditions which he finds in the country of residence, and that neither he nor his government can justifiably complain if he is accorded, like nationals, the benefit or application of these conditions."[491]

245. The national standard for the treatment of aliens did not mean that aliens were entitled to equal treatment with respect to all rights or benefits enjoyed by nationals, such as the right to vote or hold political office.[492] In addition, the national standard for the treatment of aliens did not negate specific

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[488] "Commercial treaties, particularly of the 17th century, provided for the treatment of aliens on the basis of national treatment of citizens." Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 103.

[489] *See* F.V. Garcia-Amador, "Calvo Doctrine, Calvo Clause", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 521-523, at p. 521 (referring to Carlos Calvo, *Le droit international théorique et pratique* (5th ed. 1896), vol. 6, p. 231); Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part I, Oxford, Clarendon Press, 1983, at pp. 501-502; R.C. Chhangani, "Notes and Comments. Expulsion of Uganda Asians and International Law", vol. 12, 1972, pp. 400-408, at pp. 403-404; Andreas Hans Roth, note 19 above, p. 62; and Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed., London/New York, Routledge, 1997, p. 260. *See* also Montevideo Convention on the Rights and Duties of States, Montevideo, 26 December 1933, League of Nations, *Treaty Series*, vol. 165, p. 19, art. 9, para. 2 ("Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals").

[490] "There has always been considerable support for the view that the alien can only expect equality of treatment under the local law because he submits to local conditions with benefits and burdens and because to give the alien a special status would be contrary to the principles of territorial jurisdiction and equality." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, pp. 501-502 (citations omitted).

[491] Andreas Hans Roth, note 19 above, p. 62.

[492] "Before examining the validity of the principle of national treatment, it must be observed that it is agreed on all hands that certain sources of inequality are admissible. Thus it is not contended that the alien should have political rights in the host state as of right. Moreover, the alien must take the local law as he finds it in regard to regulation of the economy and restriction on employment of aliens in particular types of employment. Access to the courts may be maintained, but with modified rules in ancillary matters: thus an alien may not have access to legal aid and may have to give security for costs." Ian Brownlie, *Principles of Public International Law*, 6th ed.,

obligations under international law with respect to the treatment of aliens as a matter of customary international law or treaty law.[493]

(c) International minimum standard

246. The notion of a minimum international standard for the treatment of aliens was recognized as early as the nineteenth century.[494] In 1926, the United States-Mexico Claims Commission discussed the notion of this standard as follows:

Oxford, Oxford University Press, 2003, p. 502 (citation omitted). The Supreme Court of the United States explained the distinction in the following manner:

> "So long as one thus perpetuates a dual status as an American inhabitant but foreign citizen, he may derive advantage from two sources of law—American and international. He may claim protection against our Government unavailable to the citizen. As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf, a patronage often of considerable value. The state of origin of each of these aliens could presently enter diplomatic remonstrance against these deportations if they were inconsistent with international law, the prevailing custom among nations or their own practices.
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> "The alien retains immunities from burdens which the citizen must shoulder. By withholding his allegiance from the United States, he leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect. In deference to it certain dispensations from conscription for any military service have been granted foreign nationals. They can not, consistently with our international commitments, be compelled to take part in the operations of war directed against their own country (Article 23, 1907 Hague Convention Respecting the Laws and Customs of War on Land, 36 Stat. 2,501-2502.). In addition to such general immunities they may enjoy particular treaty privileges. (Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1915, p. 64.)
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> "Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose." *Harisiades v. Shaughnessy,* District Court, Southern District, New York, 9 February 1950, *International Law Reports*, 1952, H. Lauterpacht (ed.), Case No. 69, pp. 345-350, at p. 347.

[493] "The Calvo doctrine, whose only function was to prevent the abuse of the right of diplomatic protection, was never a bar to those international claims based on breaches of well-established international obligations regarding the treatment of aliens." F.V. García Amador, "Calvo Doctrine, Calvo Clause", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 521-523, at p. 521. "More general variations may of course be created by treaty. The various standards of treatment commonly employed in treaties are as follows: those of reciprocity, the open door, good neighbourliness, and of identical, national, most-favoured-nation, equitable, and preferential treatment." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, pp. 501-502 (citations omitted).

[494] "Furthermore, international custom also worked in favour of developing a minimum standard for the treatment of aliens, once admitted to a State. This conception took root in customary international law during the 19th century, with treaties stipulating a number of rights reflecting a minimum standard dating back to an earlier period." Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at pp. 103-104. "The standard protects the alien's body, life and spiritual freedom, his property and his means of redress; it gives him, in the absence of treaty provisions, the necessary assurance of a decent life. It may not be much, but from the viewpoint of

> "The propriety of governmental acts should be put to the test of international standards... The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[495]

247. The notion of what constitutes the international minimum standard for the treatment of aliens has evolved over the centuries. Towards the end of the twentieth century this standard was described as follows:

> "Aliens enjoy a minimum standard of rights under the general law of nations. This standard consists of certain fundamental rights, which may be extended by municipal or international law. As commonly acknowledged, these rights are the recognition of juridical personality, standards of humane treatment, law-abiding procedures in cases of detention, the right of unobstructed access to court, the protection of life and liberty against criminal actions, the prohibition of confiscation, etc."[496]

248. The minimum international standard is based on the premise that international law provides certain standards with respect to the treatment of aliens and that a State cannot invoke its national law as a reason for failing to comply with such standards.

> "It is a well-established principle that a state cannot invoke its municipal legislation as a reason for avoiding its international obligations. For essentially the same reason a state, when charged with a breach of its international obligations with regard to the treatment of aliens, cannot validly plead that according to its own law and practice the act complained of does not involve discrimination against aliens as compared with nationals. This applies in particular to the question of the treatment of the persons of aliens. It has been repeatedly laid down that there exists in this matter a minimum international standard, and that a state which fails to

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international law in general, it gives the alien a status which is unique, namely the status of an individual who benefits directly from the law of nations." Andreas Hans Roth, note 19 above, p. 191. See also Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 910 and 932-933; Hans Kelsen, *Principles of International Law* (Revised and Edited by Robert W. Tucker), 2nd ed., Holt, Rinehart and Winston, Inc, 1966, pp. 366-367; Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed., London/New York, Routledge, 1997, p. 260; Detlev Vagts, "Minimum Standard", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 3, 1997, pp. 408-410; W. Friedman, "Some Impacts of Social Organization on International Law", *American Journal of International Law*, vol. 50, 1956, pp. 475-513, at pp. 500-502; Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, pp. 502-503; R.C. Chhangani, "Notes and Comments. Expulsion of Uganda Asians and International Law", vol. 12, 1972, pp. 400-408, at p. 404.

[495] L.F.H. Neet and Pauline Neer (U.S.A) v. United Mexican States, General Claims Commission, (Mexico/U.S.A.), Award of 15 October 1926, p. 60, at pp. 61-62.

[496] Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 105.

measure up to that standard incurs international liability. If, of course, a state treats its own nationals better than is required in respect of aliens by the international minimum standard, it will by according aliens national treatment avoid incurring international liability on that count; as it may do even if it accords them less than the national standard of treatment, so long as it still treats them in a manner which meets the minimum international standard."[497]

249. There are different views concerning the content[498] and the role of the international minimum standard for the treatment of aliens. It has been suggested that some aspects of the international minimum standard are more broadly accepted than others.[499] It has also been suggested that the indeterminate content of the standard makes it difficult to apply in practice.[500] In contrast, the view has been expressed that the standard must be somewhat vague in order to apply to various administrative and governmental organizations.[501] The possibility of establishing a single standard to

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[497] Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 931-932 (citations omitted).

[498] "The 'international minimum standard' was known by a variety of names, which included the 'standards of the more advanced States', the 'ordinary standards of justice', the 'standard of civilized justice', and so forth. Indeed, the variety of the terminology was matched with as little agreement regarding the content of the proposed standard." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 58. "A source of difficulty has been the tendency of writers and tribunals to give the international standard a too ambitious content, ignoring the odd standards observed in many areas under the administration of governments with a 'Western' pattern of civilization within the last century or so… The present writer considers that it is not possible to postulate an international minimum standard which in effect supports a particular philosophy of economic life at the expense of the host state." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, pp. 503 and 505 (citation omitted).

[499] "What critics of the minimum international standard are really opposed to is not the *principle* of having such a standard, but the *content* of some of the rules which are alleged to form part of the standard… Some of the rules comprised in the minimum international standard are more widely accepted than others. For instance, few people would deny that a state's international responsibility will be engaged if an alien is unlawfully killed, imprisoned, or physically ill-treated, or if his property is looted or damaged – unless, of course, the state can rely on some circumstances justifying the act, such as the fact that it was necessary as a means of maintaining law and order (arrest and punishment of criminals, use of force to stop a riot, and so on). On the other hand, *excessive* severity in maintaining law and order will also fall below the minimum international standard (punishment without a fair trial, excessively long detention before trial, fatal injuries inflicted by policemen dispersing a peaceful demonstration, unduly severe punishment for a trivial offence, and so on)." Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed., London/New York, Routledge, 1997, p. 261 (citations omitted).

[500] "This theory is indeterminate in its content and is not susceptible of easy application. It has partly been opposed by the Asian, African and Latin American countries because it gives a 'dignified or special status' to aliens." R.C. Chhangani, "Notes and Comments. Expulsion of Uganda Asians and International Law", vol. 12, 1972, pp. 400-408, at p. 404.

[501] "The standard may be vague, defective and incomplete. It surely does leave much room for interpretation. But interpretation is needed. The variety of administrative and governmental organization necessitates a certain vagueness, otherwise the standard never could find application in a general manner in view of the infinite possibilities of variety inherent in practical life." Andreas Hans Roth, note 19 above, p. 191.

cover all situations has been questioned.[502] In this regard, the international minimum standard has been described as a guide in the decision-making process rather than a decisive standard.[503]

(d) Relevant standard for the expulsion of aliens

250. The general standards for the treatment of aliens were originally developed primarily in response to the confiscation and nationalization of the property of aliens. These standards provide limited guidance as to the specific substantive and procedural requirements for the expulsion of aliens for the following reasons. First, the notion of denial of justice would not appear to provide a precise standard for the lawful expulsion of aliens. Secondly, the national treatment standard would not appear to be particularly helpful since nationals are usually not subject to expulsion. Thirdly, the international minimum standard may provide useful guidance with respect to the expulsion of aliens.[504] The relevance of this standard to the expulsion of aliens has been recognized in State practice and in literature.[505] However, a more precise determination of the substantive and procedural

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[502] "The basic point would seem to be that there is no single standard. Circumstances, for example the outbreak of war, may create exceptions to the international treatment rule, even where this applies in principle. Where a reasonable care or due diligence standard is applicable, then *diligentia quam in suis* might be employed, and would represent a more sophisticated version of the national treatment principle. *Diligentia quam in suis* would allow for the variations in wealth and educational standards between the various states of the world and yet would not be a mechanical national standard, tied to equality. Though the two are sometimes confused, it is not identical with national treatment. There is support for the view that *diligentia quam in suis* has long been accepted as the standard in relation to harm resulting from insurrection and civil war. Finally, there are certain overriding rules of law including the proscription of genocide which are clearly international standards." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 504 (citations omitted). The phrase "*diligentia quam in suis*" is translated as "national treatment but on the basis of the standard *ordinarily* observed by the particular state in its own affair". Ibid., p. 504, n. 35.

[503] "The international minimum standard which emerged during the 19th century suffered from a misnomer, however, in that it was not — and indeed never has become — a definite *standard* with a fixed content. Rather, it was a highly generalized prescription to be used in what Professor McDougal calls 'the process of decision', a *process* by which the question of whether a State was responsible under international law for an alien's injury could be weighed and resolved given the context and facts of a particular claim." Richard B. Lillich, note 473 above, p. 350 (quoting M. McDougal and Associates, *Studies in World Public Order*, p. 869 (1960)). "First of all, it must be realized that the minimum standard, as it is conceived in general, is a form of a universal command which cannot be framed, but has a distinguishable influence in each particular aspect of the alien's existence." Andreas Hans Roth, note 19 above, p. 188.

[504] "Irrespective of the existence or non-existence of an unlimited right to expel foreigners, their ill-treatment, abrupt expulsion or expulsion in an offensive manner is a breach of the minimum standards of international law with which their home State may expect compliance. If a State chooses to exercise its sovereign discretion in contravention of this rule, it does not abuse its rights of sovereignty. It simply breaks a prohibitory rule by which its rights of exclusive jurisdiction are limited." Georg Schwarzenberger, "The Fundamental Principles of International Law", *Recueil des cours de l'Académie de droit international*, vol. 87, 1955-I, pp. 290-383, at pp. 309-310.

[505] "In principle, the alien is entitled to treatment no less favourable than the 'minimum standard' required by international law. His expulsion arbitrarily or without good cause may well amount to treatment below that of the minimum standard." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus

requirements for the lawful expulsion of aliens requires consideration of the relevant human rights of all individuals under contemporary international law.

B. Contemporary limitations

1. The impact of human rights on the treatment of aliens

251. The development of international human rights law has had a significant impact on the rules of international law governing the treatment of aliens to the extent that these rights are recognized as belonging to individuals as human beings irrespective of their status as nationals or aliens in relation to a particular State.[506] The recognition of the human rights of individuals irrespective of their

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Nijhoff Publishers, 1988, p. 460 (citation omitted refers to *Administrative Decision No. V, United States v. Germany, Award of 31 October 1924,* United Nations, *Reports of International Arbitral Awards*, vol. VII, p. 119; *L.F.H. Neet and Pauline Neer (U.S.A) v. United Mexican States, General Claims Commission, (Mexico/U.S.A.), Award of 15 October 1926*, p. 60; *Hines v. Davidowitz et al.*, 312 U.S. 52 (1941)). "The expulsion itself must be carried out in accordance with the general standards which international law has established for the treatment of aliens. Due regard must, therefore, be paid to the dignity of the individual and to his basic rights as a human being." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 308. "Among the topics developed were the rights of aliens to fair civil or criminal judicial proceedings (i.e. not to be subjected to denial of justice), to decent treatment if imprisoned, and to protection against disorders, violence, and against deportation in abusive ways, and to the enjoyment of their property unless taken for a public purpose and with fair compensation." Detlev Vagts, "Minimum Standard", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 3, 1997, pp. 408-410, at p. 408. "Once foreigners are admitted to a country, the arbitrary exercise of territorial jurisdiction in relation to them is governed by the rule on the minimum standards of international law. This does not require equality with nationals of the country concerned, nor is such equality necessarily sufficient. International customary law lays down its own standards with which the State of sojourn, residence or domicile of a foreigner must comply. Special issues, such as arbitrary expulsion of foreigners, are either governed by these minimum standards or they are not." Georg Schwarzenberger, "The Fundamental Principles of International Law", *Recueil des cours de l'Académie de droit international*, vol. 87, 1955-I, pp. 290-383, at pp. 317-318.

[506] "Although it was never denied that man is the ultimate object of law, and that international law was no exception to this basic principle, international law was traditionally concerned only with the foreign national who had to be treated according to special rules under treaties and certain standards prescribed by general international law." Hermann Mosler, "The International Society as a Legal Community", *Recueil des cours de l'Académie de droit international*, vol. 140, 1976-IV, pp. 1-320, at p. 70. "Recent developments in international law, as for example, the Universal Declaration of Human Rights (1948) provides to all individuals, whether nationals or aliens, certain human rights and fundamental freedoms." R.C. Chhangani, "Notes and Comments. Expulsion of Uganda Asians and International Law", vol. 12, 1972, pp. 400-408, at p. 404. For an overview on the applicability of human rights to aliens, *see* United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Note by the Secretary-General, The Problem of the Applicability of Existing International Provisions for the Protection of The Human Rights of Individuals Who Are Not Citizens of The Country in Which They Live, Survey of international instruments in the field of human rights concerning distinctions in the enjoyment of certain rights as between nationals and individuals who are not citizens of the States in which they live, E/CN.4/Sub.2/335,16 August 1973.

nationality[507] has been viewed as an important addition to the rights previously enjoyed by aliens under the rules of international law governing the treatment of aliens.[508] However, human rights have also been described as providing inadequate protection for aliens with respect to expulsion.[509]

252. In 1985, the General Assembly adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, expressly recognizing that "the protection of human rights and fundamental freedoms provided for in international instruments should also be ensured for individuals who are not nationals of the country in which they live".[510] The elaboration of the Declaration, which took more than 10 years, was initiated as "a 'compromise' response to deal with the problem of mass expulsion as exemplified by the summary expulsion of many thousands of

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[507] "[T]he transformation of the position of the individual is one of the most remarkable developments in contemporary international law." Shigeru Oda, "Legal Status of Aliens", *in Max* Sørensen (dir.) *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, at p. 471. "In recent years the most important single change in the principle of domestic jurisdiction has been the development of a law of human rights. The idea that a person may be entitled in international law to certain rights that belong to him as a human person, and not merely indirectly in his capacity as a national of one State and an alien in another, and moreover that these rights can be available to him even against his own national State, is an invasion of one of the classical areas of the reserved domain." Robert Y. Jennings, "General Course on Principles of International Law", *Recueil des cours de l'Académie de droit international*, vol. 121-II, Leyde, A.W. Sijthoff, 1967, pp. 321-605, at p. 503.

[508] "In sum, the principal thrust of the contemporary human rights movement is to accord nationals the same protection formerly accorded only to aliens, while at the same time raising the standard of protection for all human beings, nationals as well as aliens, far beyond the minimum international standard developed under the earlier customary law." Myres S. McDougal et al., note 475 above, p. 464 (citation omitted). "Treaty provisions which concern human rights enlarge upon the minimum standard in many important respects ...". Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 105. "It is certainly the case that since 1945 developments concerning human rights have come to provide a new content for the international standard based upon those human rights principles which have become a part of customary international law. These principles include the principle of non-discrimination on grounds of race, the prohibition of genocide, and the prohibition of torture and of inhuman or degrading treatment or punishment. A careful synthesis of human rights standards and the modern 'treatment of aliens' standards is called for." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 505 (citations omitted).

[509] "Conceptually, human rights limits on expulsion are rather peculiar. As a rule, human rights protect all human beings regardless of their nationality; in some exceptional cases, such as the right to participate in elections, they can only be invoked by citizens of a particular country. Human rights limits on expulsion, in contrast, protect solely aliens. This explains why most of these guarantees provide comparatively rather weak protection allowing for many exceptions. The sovereignty of States regarding the admission of aliens is still the point of departure and limitations on the power to order expulsions and to deport are the exceptions. There is a danger in this approach not to take seriously enough the legitimate needs of persons living abroad and to recognize only insufficiently their vulnerability." Walter Kälin, note 277 above, p. 143 (citation omitted).

[510] Resolution 40/144, 13 December 1985, preambular paragraph 7.

Asians from Uganda in the early seventies."[511] It has been suggested that the Declaration does not provide any more protection for aliens than the two Covenants.[512]

253. There are a number of human rights which may be relevant in the determination of the lawfulness of an expulsion, such as the rights of the family, the rights of the child, freedom of expression, trade union rights, property rights, the right to enter or return to the State of nationality, procedural guarantees, the right to humane treatment, and the prohibition against torture.[513] These human rights have been addressed in a number of treaties and declarations adopted within the framework of the United Nations[514] as well as regional organizations.[515]

254. There are different views concerning the relationship between the rules of international law relating to human rights and those relating to the treatment of aliens, including: (1) the minimum standard for the treatment of aliens is virtually the same as the fundamental human rights of individuals regardless of nationality;[516] (2) international human rights law has evolved to the point

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[511] Gervase J.L. Coles, "The human rights of individuals who are not nationals of the country in which they live", *Yearbook*, International Institute of Humanitarian Law, 1985, pp. 126-153, at p. 126 (citation omitted).

[512] "To a considerable extent the provisions of the Declaration repeat, less comprehensively, the provisions which, under the 1966 Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, are already binding upon most states in respect of 'all individuals within [their] territory and subject to [their] jurisdiction', thereby including aliens as well as nationals." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 909. "Not surprisingly, perhaps, the breadth of this topic has led finally to a statement which is very general. Not only does it not add much to the understanding of existing rights but it can be argued that, overall, the Declaration will have a repressive effect where further efforts to achieve progress in the development of the rights of aliens are concerned. Indeed, it was found necessary to include in the second article of the Declaration a 'saving' clause that nothing within the Declaration would prejudice the enjoyment of the rights which under international law a State was obliged to accord to aliens, even where the Declaration did not recognize such rights or recognized them to a lesser extent." Gervase J. L. Coles, note 511 above, p. 126.

[513] See R.C. Chhangani, "Expulsion of Benin Nationals and International Law", *Indian Journal of International Law*, vol. 20, 1980, pp. 149-154, at p. 151. *See* also Parts VII.B, VII.C, VIII.B and IX.B.

[514] See, in particular, Charter of the United Nations, articles 1(3), 13(1), 55, 56, 62(2) and 76; Resolution 217 (III), International Bill of Human Rights: Universal Declaration of Human Rights, 10 December 1948; and International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 4668, p. 171, p. 171.

[515] See, for example, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Rome, 4 November 1950, *European Treaty Series*, No. 5; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, note 55 above; American Convention on Human Rights, "Pact of San José, Costa Rica", San José (Costa Rica), 22 November 1969, United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123; African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984, *European Treaty Series*, No. 117.

[516] "In theory, aliens are not protected as individuals but in their capacity as foreign nationals. If we look more closely at the detailed requirements of this standard, the individual rules it comprises are seen to be more or less

that it supersedes the equal treatment or international minimum standard for the treatment of aliens;[517] (3) international human rights law will contribute to the further development of the standard for the treatment of aliens;[518] (4) the international minimum standard for the treatment of aliens has a continuing relevance to the extent that it provides additional obligations for States with respect to the treatment of aliens;[519] (5) the separate procedures for redressing violations of the two different types

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the same as the minimum fundamental rights which today are considered to be ***human rights regardless of nationality***." Hermann Mosler, "The International Society as a Legal Community", *Recueil des cours de l'Académie de droit international*, vol. IV, tome 140, 1976, pp. 1-320, at p. 72 (citation omitted, italics in original).

[517] "It is hoped that this will prove to be the first step of a development towards the recognition of international human rights which subsume and replace the standard by putting all individuals, aliens and nationals, subjects and stateless persons, under the equal protection of the law of nations." Andreas Hans Roth, note 19 above, p. 191. "As regards the doctrine, the international recognition of human rights has evolved sufficiently to justify the view that the principle of equality, as well as the minimum international standard, have been superseded. The two traditional standards are based on the distinction between nationals and aliens; the general and regional instruments recognizing human rights ignore altogether such a distinction." F. V. Garcia-Amador, "Calvo Doctrine, Calvo Clause", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 521-523, at p. 523.

[518] "As the corpus of human rights law builds up, the detailed provisions of recent conventions will move into the foreground, to impose specific obligations upon States. During this evolutionary period, however, there can be little doubt that such detailed provisions will continue to indicate the content of *general* obligations already assumed by States and to set out standards of treatment to be accorded to both nationals and aliens. An example of this slow but progressive limitation of States' powers is evident in the history and development of the principle of non-discrimination." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 74 (citation omitted, italics in original). "The concept of human rights has certainly much to contribute to the international minimum standard in certain areas, especially where the international minimum standard has not already been clearly stated or where it tends to be outmoded. Thus, affirmations of the right to life, liberty and freedom from slavery, the right to recognition as a person before the law, the right to freedom from arbitrary arrest and detention or the right to a fair trial help to confirm the rights of aliens which may or may not have been conceded before." Chittaranjan Felix Amerasinghe, *State Responsibility for Injuries to Aliens*, London, Oxford University Press, Clarendon Press, 1967, p. 279. "Indeed, as has been demonstrated, the international human rights norms guaranteeing the right to life, liberty and security of person, as well as the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, reinforce the traditional law governing the treatment of aliens applicable in all three cases. By invoking international human rights norms in similar situations in the future, a trend which reasonably can be anticipated, States will not only be protecting the human rights of individuals, but also contributing to the development of a contemporary law governing the treatment of aliens that will be acceptable to all States and of value to the entire international community." Richard B. Lillich, note 473 above, p. 410 (citations omitted).

[519] "In many cases a State can, in asserting rights for its nationals abroad, claim that they are human rights available irrespective of nationality and irrespective of local laws. Those rights would include rights conferred by customary international law and, among States that are parties, those guaranteed by multilateral conventions, chiefly the covenants sponsored by the United Nations. In Western Europe an alien can take advantage of the European Convention on Human Rights and in Latin America of the American Convention on Human Rights. For all of those advances in the protection of human rights rules, however, there are still significant ways in which the traditional minimum standard demands more of State behaviour." Detlev Vagts, "Minimum Standard",

of rules of international law have a continuing relevance;[520] and (6) the synthesis of international human rights and the international minimum standard for the treatment of aliens would not be acceptable to the majority of States.[521] More specifically, the view has been expressed that human rights provide relatively weak guarantees for aliens who are subject to expulsion because the rights of aliens in such circumstances are subject to many exceptions.[522]

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in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 3, 1997, pp. 408-410, at pp. 409-410.

[520] "When the new human rights prescriptions are considered in mass, they extend to all the basic human dignity values the peoples of the world today demand, and the more detailed standards specified with regard to each of these values exhibit all the precision and definiteness that rational application either permits or requires. The consequence is thus, as Dr. Garcia-Amador insisted, that continuing debate about the doctrines of the minimum international standard and equality of treatment has now become highly artificial; an international standard is now authoritatively prescribed for all human beings. It does not follow, however, that these new developments in substantive prescription about human rights have rendered obsolete the protection of individuals through the traditional procedures developed by the customary law of the responsibility of states for injuries to aliens." Myres S. McDougal et al., note 475 above, p. 464 (citations omitted). "International lawyers have already begun to speak of the assimilation of the customary law regarding the treatment of aliens with the new law of the Charter regarding 'universal respect for, and observance of, human rights.' The assimilation is logical enough so far as concerns the 'minimum standards' of treatment, that is, the scope of the fundamental rights and freedoms protected by international law. Human rights, *ex hypothesi*, are rights which attach to all human beings equally, whatever their nationality. And in general, as I have said, the Universal Declaration offers aliens at least as much as the minimum standards of treatment guaranteed under customary law. To assimilate the position of aliens to that of nationals in regard to remedies would, however, be wholly unacceptable in the present state of international remedies for violations of human rights. No doubt, abuses of the right of diplomatic protection have occurred sometimes in the past when its exercise was backed by the threat or use of force. That, however, is a matter which concerns the law regarding the use of force, and it is now covered by Article 2, paragraph 4, of the Charter. The customary law right of diplomatic protection has its roots deep in history and was devised to meet an essential need in the international community if international trade and intercourse were to flourish. In all eras, and still today, xenophobic tendencies and discrimination against foreigners manifest themselves periodically in different countries. A foreigner is peculiarly exposed to deprivation of fundamental human rights, and the remedy of diplomatic intervention is essential both for his protection and to reduce the risk of more serious action by the State whose national he is. Not until a general and effective system exists of protection of human rights through international organs will it be safe to contemplate the disappearance of the diplomatic protection of foreigners by their own State." Humphrey Waldock, "Human rights in contemporary international law and the significance of the European Convention", in *The European Convention on Human Rights*, British Institute of International and Comparative Law, International Law Series No. 5, 1965 (*The International and Comparative Law Quarterly*, Supplementary Publication No. 11, 1965), pp. 1-23, at pp. 3-4 (citations omitted).

[521] "A recent development has been the appearance of attempts to synthesize the concept of human rights and the principles governing the treatment of aliens. ... This particular synthesis of human rights and the standard of treatment for aliens involves codifying the 'international minimum standard', raising that standard, extending it to new subject matter, and relating internal affairs and local law to international responsibility to a degree which the majority of states would find intolerable." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, pp. 504-505.

[522] "Conceptually, human rights limits on expulsion are rather peculiar. As a rule, human rights protect all human beings regardless of their nationality; in some exceptional cases, such as the right to participate in elections, they can only be invoked by citizens of a particular country. Human rights limits on expulsion, in

255. It would not appear to be necessary to give further consideration to the relationship between these two fields of international law at the present time. It is sufficient to note that both of these fields of international law may contain relevant rules for the present topic. The relevant rules of international law will be considered in relation to the specific substantive and procedural requirements[523] for the lawful expulsion of aliens regardless of whether such rules may be characterized as governing the human rights[524] of individuals or the treatment of aliens.[525] Respect for human rights may also be an

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contrast, protect solely aliens. (The special problem of sending one's own citizens into exile abroad is not discussed here.) This explains why most of these guarantees provide comparatively rather weak protection allowing for many exceptions. The sovereignty of States regarding the admission of aliens is still the point of departure and limitations on the power to order expulsions and to deport are the exceptions. There is a danger in this approach not to take seriously enough the legitimate needs of persons living abroad and to recognize only insufficiently their vulnerability." Walter Kälin, note 277 above, p. 143 and n. 1 (citation reproduced in parentheses).

[523] "Limits to expulsion in human rights law can take three forms: First, human rights treaties may contain provisions explicitly addressing expulsion and limiting the possibility of States to expel undesired aliens … Second, human rights treaties may put procedural limits on expulsion … Finally, expulsions which are compatible with these provisions and requirements may be prohibited because their execution would violate other human rights not specifically addressing the issue of expulsion: Thus, it goes without saying that discriminatory expulsions violate a basic requirement of human rights law … This is a rather traditional way of categorizing the limits to expulsion in international human rights law. Looking at the different spheres where the obstacles to lawful expulsion originate, a different categorization is possible. (1) Expulsion is not permissible under international human rights law where the *expelling authorities* violate substantive conditions (e.g. requirements of non-arbitrariness or of valid grounds for expulsion such as dangers to national security or public order) or disregard procedural safeguards. (2) Expulsion becomes prohibited where it would violate overriding *individual interests* of the person concerned that relate to his or her situation in the country of sojourn if such interests are protected by human rights guarantees. Here the right to remain in one's own country or the right to protection of privacy and family life may create obstacles to the execution of an otherwise lawful expulsion. (3) Limits to expulsion may finally originate in the *sphere of the country of origin* of the person concerned or another foreign State that will receive the expellee if the expulsion order is executed. This is, e.g., the case where an expulsion becomes unlawful under international human rights law because the persons concerned would be tortured or killed in the country of destination." Ibid., pp. 144-145 (italics in original).

[524] "There is another aspect of the law of human rights that is of general significance. For a number of reasons, partly historical, the law of human rights has been expressed not in terms of general principle—such as the national standard, or an international general minimum standard—but in a list of separate rights separately defined. It is true that the principle of non-discrimination remains central; but even here it has been greatly elaborated for it is no longer enough to think in terms of non-discrimination between different nationalities, but more importantly in terms of non-discrimination with reference to race, sex, language or religion." Robert Y. Jennings, "General Course on Principles of International Law", *Recueil des cours de l'Académie de droit international,* vol. 121-II, Leyde, A.W. Sijthoff, 1967, pp. 321-605, at p. 504.

[525] "It is submitted that the relation between the international minimum standard and human rights is one of mutual interaction rather than that the latter determines the former. Conceptions of human rights should naturally have some influence in determining the international minimum standard in a given situation … But, on the one hand, it cannot be categorically asserted that the international minimum standard in the treatment of aliens is totally synonymous with the notion of human rights. For example, it is not true to say that the law requires that aliens be given the basic political rights or the basic right to own any kind of property to which nationals may be entitled under the doctrine of human rights. On the other hand, there are certain notions in the existing formulations of human rights which are vague and require concrete definition in practice, such as 'arbitrary deprivation of property'. The current practice of States in international relations which would constitute the

important factor to consider with respect to the consequences of expelling an alien to a particular State.[526]

2. The principle of non-discrimination

(a) The notion of discrimination

256. Traditional international law was primarily concerned with discrimination in relation to the treatment by a State of foreigners. The principle of non-discrimination in a broader sense is a relatively recent development which may be traced to the founding of the United Nations after the Second World War.

> "Traditional international law did not concern itself with discrimination except as an element to be taken into consideration in determining the legality of a State's treatment of foreigners … After the First World War the redrawing of European frontiers and the introduction of the mandate system for the territories detached from Germany and Turkey was accompanied by a more systematic attempt to provide international guarantees for the protection of particular minorities. At the same time feminist movements were beginning to make the inequality of the sexes a matter of international concern at the League of Nations, more especially in the International Labour Organisation and in the Inter-American Organization. Even so, prior to the United Nations Charter the notion of non-discrimination as a general principle of international law remained a remote prospect. The racial atrocities of the Nazi regime, however, led to repeated emphasis being placed in the Charter on the principle of non-discrimination in the enjoyment of human rights and freedoms …"[527]

257. The notion of discrimination was described in detail in a memorandum prepared by the Secretary-General in 1949 for the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, as follows:

> "The word 'discrimination' is used here in its pejorative sense, i.e., it is used to refer not to all differentiations, but only to distinctions which have been established to the detriment

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international minimum standard in regard to the treatment of aliens will, then, influence such definition." Chittaranjan Felix Amerasinghe, *State Responsibility for Injuries to Aliens*, Oxford, Clarendon Press, 1967, p. 279 (citations omitted).

[526] "An expulsion encroaching upon the human rights protected by the International Covenant on Civil and Political Rights of 1966 or a regional instrument such as the European Convention on Human Rights of 1950 might be unlawful for the respective signatory State. Where the procedure of expulsion itself constitutes an encroachment upon human rights, the expulsion itself, even if reasonably justified, must be characterized as contrary to international law. A State expelling an alien into a country where such a violation is likely to take place would commit a breach of international law." Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 104. *See* Part VII.C.3.

[527] Warwick A. McKean, "The Meaning of Discrimination in International and Municipal Law", *The British Year Book of International Law*, vol. 44, 1970, pp. 177-192, at p. 177.

of individuals belonging to a particular group. The Sub-Commission on Prevention of Discrimination and Protection of Minorities has recognized this meaning of the word.

> "The following concepts may be useful in the attempt to formulate an accurate definition of those practices which should be included in the term 'discrimination', and in determining what discriminatory acts should be prevented:
>
> "(*a*) Discriminatory practices are those detrimental distinctions which do not take account of the particular characteristics of an individual as such, but take into account only collective qualifications deriving from his membership in a certain social or other group;
>
> "(*b*) Certain distinctions, which do not constitute discrimination, are justified. These include: (1) differences of conduct imputable or attributable to an individual, that is to say, controlled by him (i.e. industriousness, idleness; carefulness, carelessness; decency, indecency; merit, demerit; lawfulness, delinquency); and (2) differences in individual qualities not imputable to the person, but having a social value (physical or mental capacity).
>
> "Thus, discrimination might be defined as a detrimental distinction based on grounds which may not be attributed to the individual and which have no justified consequences in social, political or legal relations (colour, race, sex, etc.), or on grounds of membership in social categories (cultural, language, religious, political or other opinion, national circle, social origin, social class, property, birth or other Status)."[528]

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[528] The Main Types and Causes of Discrimination, Memorandum submitted by the Secretary-General, E/CN.4/Sub.2/40/Rev.1, 7 June 1949, paras. 87-88.

(b) Relationship to the principle of equality

258. The principle of non-discrimination has been described as a negative formulation of the principle of equality before the law.[529] It has been suggested that these principles have acquired the status of customary international law.[530]

> "Belief in equality – the view that unless there is a reason for it, recognized as sufficient by some identifiable criterion, one man should not be preferred to another, is a deep-rooted principle in human thought. The principle has been recognized as one of the fundamental principles of modern democracy and government based on the rule of law, and has been assimilated into many legal systems. As Lauterpacht has said, 'The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties.' In international law the principle has usually been stated in the negative form, as one of non-discrimination."[531]

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[529] "Non-discrimination and equality of treatment are equivalent concepts. As the Permanent Court said in the *Minority Schools in Albania* case, 'Equality in law precludes discrimination of any kind.' 'Discrimination' is defined under international law to mean only unreasonable, arbitrary, or invidious distinctions, and does not include special measures of protection of the two types described above. Putting it positively, the equality principle forbids discriminatory distinctions but permits and sometimes requires the provision of affirmative action. The principle of the equality of individuals under international law does not require a mere formal or mathematical equality but a substantial and genuine equality in fact." Warwick MacKean, *Equality and Discrimination under International Law*, Oxford Clarendon Press, 1983, p. 288 (citations omitted) (quoting *Permanent Court of International of International Justice, Minority Schools in Albania, Advisory Opinion*, series A/B, No. 64, p. 19). "The principle that 'all beings are born free and equal in dignity and rights' has now been universally accepted. The principle of 'equality' moreover implies that there should be no differentiation based upon factors over which the individual has no control such as, his race, his colour, his descent, and his national or ethnic origin." R. C. Chhangani, "Notes and Comments. Expulsion of Uganda Asians and International Law", vol. 12, 1972, pp. 400-408, at p. 405. "Equality and nondiscrimination may be seen as affirmative and negative statements of the same principle." B. G. Ramcharan, "Equality and Nondiscrimination", *in* Henkin, Louis (ed.), *The International Bill of Rights*, New York, Columbia University Press, 1981, pp. 246-269, at p. 252.

[530] "The principles of equality and nondiscrimination are now widely acknowledged as forming part of international customary law. Some have even argued that at least as regards consistent patterns of gross violation by government and societies, these principles are part of international *jus cogens*, peremptory norms binding on all as superior law." Ibid., p. 249.

[531] Warwick MacKean, *Equality and Discrimination under International Law*, Oxford Clarendon Press, 1983, p. 285 (citations omitted) (quoting Sir Hersch Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, New York, 1945, p. 115)). "Peaslee, *Constitutions of the Nations* (1965), vol. I, p. 7, estimates that some 75 per cent of the world's constitutions acknowledge the principle of equality." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 83, n. 1. "That 'non-discrimination' is a negative way of stating the principle of equality is illustrated by the jurisprudence of the West German Federal Constitutional Court, which has repeatedly affirmed that the principle of equality is violated when a reasonable and objectively evident reason for different treatment cannot be found." Warwick MacKean, *Equality and Discrimination under International Law*, Oxford Clarendon Press, 1983, p. 287.

259. There may also be some overlap between the principle of non-discrimination and more traditional principles such as arbitrariness, good faith, abuse of rights or denial of justice.[532]

(c) Differential treatment versus discrimination

260. The principle of non-discrimination does not prohibit all distinctions among individuals or groups of individuals.[533] Whether differential treatment is contrary to the principle of non-discrimination may depend on whether there is a legitimate aim, an objective justification and whether proportional means are used for achieving that aim.[534]

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[532] "It is certain that the principle recorded above will overlap in practice and to a certain extent with the older principles involving abuse of rights and denial of justice." Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part I, Oxford, Clarendon Press, 1983, p. 81.

[533] "Many distinctions, established by law, do not constitute discrimination because they are established on just grounds and apply to all alike, not merely to members of certain particular social groups. Examples of these include:

(a) Legal incompetence due to minority, to criminality, to insanity, or to absence from the country;

(b) Restriction of liberty in virtue of lawful arrest or conviction;

(c) Denial of political rights to foreigners;

(d) Lawful expropriation with fair indemnity;

(e) Diplomatic immunities;

(f) Inviolability and immunities of members of Parliament, etc.

The above list is not intended to be exhaustive."

The Main Types and Causes of Discrimination, Memorandum submitted by the Secretary-General, E/CN.4/Sub.2/40/Rev.1, 7 June 1949, para. 126. *See also* B.G. Ramcharan, "Equality and Nondiscrimination", *in* Henkin, Louis (ed.), *The International Bill of Rights*, New York, Columbia University Press, 1981, pp. 246-269, at pp. 252-253.

[534] "The concept of discrimination calls for more sophisticated treatment in order to identify unreasonable (or material) discrimination as distinct from the different treatment of non-comparable situations." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 505 (citations omitted). "Discrimination is not synonymous with differential treatment. The concept of discrimination, as employed in international law, connotes distinctions which are unfair, unjustifiable, or arbitrary." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 78. "By unlawful discrimination is meant some exclusion or restriction, privilege or preference, which has the effect of nullifying a particular right. The general principle of equality imposes on those who wish to treat individuals differently the duty of showing valid reasons for such differential treatment. The question is whether the bases advanced for distinction are *relevant,* and thereafter whether the measures adopted are reasonable and proportional. The international legal concept of discrimination thus connotes distinctions which are unfair, unjustifiable, or arbitrary." Guy S. Goodwin-Gill, "Migration: International Law and Human Rights", *in* Bimal Ghosh (ed.), *Managing Migration,* Oxford University Press, 2000, pp. 160-189, at pp. 167-168 (citations omitted). "What is important is that there must be some rational basis for the differentiation relevant to the purpose that is sought to be achieved … The motivation behind a particular rule is therefore the main factor in

> "Distinctions are reasonable if they pursue a legitimate aim and have an objective justification, and a reasonable relationship of proportionality exists between the aim sought to be realized and the means employed. These criteria will usually be satisfied if the particular measures can reasonably be interpreted as being in the public interest as a whole and do not arbitrarily single out individuals or groups for invidious treatment. For example, it is reasonable to withhold the exercise of political rights from aliens, infants, and the insane."[535]

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judging whether a rule is discriminatory or not. This line of approach has found support in the decision of the United States Supreme Court in *Yick Wo* v. *Hopkins* and in decisions of the European Court of Human Rights." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington, D.C., American Society of International Law, 1992, p. 18 (principle of non-discrimination discussed in relation to the admission of aliens) (cross-references omitted). "Where non-discrimination is required under a provision of a treaty or of a state's own law, it does not necessarily preclude all differential treatment. While such a provision requires similar treatment of aliens in circumstances which are materially the same as for a national, it does not require similar treatment where they are different in a material respect." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 932, n. 3 (citing, as examples, *X v. Conseil d'Etat du Canton de Zurich* (1967), ILR, 72, pp. 574, 577; *Turkish National Detention on Remand Case* (1971), ILR, 72, p. 263; *Polish Priest Compensation Case* (1974), ILR, 74, p. 419; *Procedural Rights of Aliens Case* (1976), ILR, 74, p. 412). "That is because the principle of equality as a human right does not exclude distinctions based on differences of two kinds, which are generally considered admissible and justified: (a) differentiation based on character and conduct imputable to the individual for which he may be properly held responsible (examples are industriousness, idleness, carefulness, carelessness, decency, indecency, merit, demerit, delinquency, lawfulness, etc.); and (b) differentiation based on individual qualities, which in spite of not being qualities for which the individual can be held responsible, are relevant to social values and may be taken into account (examples are physical and mental capacities, talent, etc.). On the other hand, moral and juridical equality exclude any differentiation based on grounds which have no relevance to merit or social value and should not be considered as having any social or legal meaning, whether they are innate, such as color, race, and sex; or social generic categories, such as language, political or other opinions, national or social origin, property, birth or other status." B. G. Ramcharan, "Equality and Nondiscrimination", *in* Louis Henkin (ed.), *The International Bill of Rights,* New York, Columbia University Press, 1981, pp. 246-269, p. 253. "[T]he word 'discrimination' must be reserved for situations of clearly unfair or unjust differentiation in the treatment of individuals or groups of people, *inter alia* where distinctions are not based on rational and reasonable criteria." Terje Einarsen, "Discrimination and Consequences for the Position of Aliens", *Nordic Journal of International Law,* vol. 64, 1995, pp. 429-452, at p. 429.

[535] Warwick MacKean, *Equality and Discrimination under International Law,* Oxford Clarendon Press, 1983, p. 287. "The existence of a legal principle is of course one thing, its treaty expression, interpretation and application quite another. It is, however, true that the concept of discrimination under international law has some common features. On the one hand, the principle of *non-discrimination* does not require absolute equality or identity of treatment but recognises *relative equality,* i.e. different treatment proportionate to concrete individual circumstances. On the other hand, distinctions must pursue a *legitimate aim* and have an *objective justification,* and a *reasonable relationship of proportionality* between the aims sought to be realised and the means employed. Furthermore, a *discriminatory motive* is not a necessary ingredient of a violation of the principle of equality; distinctions are discriminatory also if they have the *effect* of nullifying or impairing equality of treatment. Except for minor variations, these formulations square with the language usually employed by contemporary judicial tribunals which judge discrimination issues on the basis of international law, such as the International Court of Justice in the Hague, the Commission and Court of Human Rights in Strasbourg and the Human Rights Committee in Geneva." Terje Einarsen, "Discrimination and Consequences for the Position of Aliens", *Nordic Journal of International Law,* vol. 64, 1995, pp. 429-452, at pp. 431-432 (citations omitted).

261. The party arguing that differential treatment does not violate the principle of non-discrimination or the principle of equality may have the burden of proof with respect to these criteria.[536]

(d) *De jure* and *de facto* discrimination

262. There are two ways in which a State may violate the principle of non-discrimination, namely, (1) by enacting laws which contain discriminatory provisions or (2) by applying laws which do not contain such provisions in a discriminatory manner.[537]

> "A State may not in the enactment of its laws and regulations or policy formulations prescribe such conditions which are *per se* discriminatory or capable of being applied in a fashion which would have the effect of discriminating against persons on the ground of race,

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[536] "The principle of non-discrimination expressly rules out certain types of distinction, and raises a very strong presumption of equality. The burden of proof lies on the party seeking to invoke exceptions to show objective justification and proportionality." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 87 (citation omitted). "There is a growing body of legal materials on the criteria by which illegal discrimination may be distinguished from reasonable measures of differentiation, i.e. legal discrimination. The principle of equality before the law allows for factual differences such as sex or age and is not based on a mechanical conception of equality. The distinction must have an objective justification; the means employed to establish a different treatment must be proportionate to the justification for differentiation; and there is a burden of proof on the Party seeking to set up an exception to the equality principle." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 547 (extensive citations as follows: criteria for distinguishing legal and illegal discrimination (*Minority Schools in Albania* (1935), PCIJ, Ser. A/B, no. 64. *Association Protestante* v. *Radiodiffusion-Television Beige*, ILR 47,198; *Beth-El Mission* v. *Minister of Social Welfare*, ILR 47,205.); objective justification (*See* Judge Tanaka, ICJ Reports (1966), at 302-16; *Belgian Linguistics* case (Merits), ECHR Judgment of 23 July 1968, ILR 45,136,163-6,173-4,180-1,199-201,216-17; *National Union of Belgian Police* case, ECHR, Ser. A, vol. 19,19-92; *Swedish Engine Drivers' Union* case, ibid., vol. 20,1617; *Schmidt and Dahlstrom* case, ibid., vol. 21,16-18; *Case of Engel and Others*, ibid., vol. 22, 29-31; *Marckx* case, ibid., vol. 87,12-16; *Abdulaziz* case, ibid., vol. 94, 35-41; *James and Others*, ibid., vol. 98,44-6; *Lithgow and Others*, ibid., vol. 102, 66-70; *Gillow* case, ibid., vol. 109,25-6; *Mathieu-Mohin and Clerfayt* case, ibid., vol. 113,26; *Monnell and Morris* case, ibid., vol. 115,26-7; *Bouamar* case, ibid., vol. 129,25-6); proportionality (*Belgian linguistics* case, last note; *SocieteX, WetZv, Republique Federale d'Allemagne*, Europ. Comm. of HR, *Collection of Decisions*, vol. 35,1); and burden of proof (Judge Tanaka, Diss. Op., ICJ Reports (1966), at 309.) See also *Rankin v. The Islamic Republic of Iran*, note 136 above, p. 142, para. 22 (quoted in Part XI.B).

[537] "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by the public authority with an evil eye and an unequal hand, so as practically to make an unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." *Yick Wo v. Hopkins*, 118 U.S. 356 (1885). "A discriminatory motive is not a necessary ingredient of a violation of the principles of equality, though it will make the finding of such a violation easier. As the recent anti-discrimination conventions put it, distinctions are discriminatory if they have 'the purpose or effect of nullifying or impairing equality of treatment'." Warwick MacKean, *Equality and Discrimination under International Law*, Oxford Clarendon Press, 1983, p. 287. "During the drafting of the Covenants it was generally recognized that the concept of equality referred to both de jure and de facto equality." B.G. Ramcharan, "Equality and Nondiscrimination", *in* Louis Henkin (ed.), *The International Bill of Rights*, New York, Columbia University Press, 1981, pp. 246-269, at pp. 253-254 (citation omitted).

sex, language, or religion, as well as color, nationality or other status. A State is also required to ensure in the administration of its laws and regulations and in the exercise of any discretion that may be vested in the functionaries of the State that no person is discriminated against on the aforesaid grounds."[538]

263. The principle of non-discrimination would seem to be more frequently violated in the second sense by means of the discriminatory application of laws which are not discriminatory *per se*. [539]

(e) Recognition of the principle of non-discrimination

264. By the end of the twentieth century, the principle of non-discrimination may have attained the status of a generally recognized principle of international law or customary international law.[540] The principle of non-discrimination has been recognized in similar terms in a number of international instruments.[541]

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[538] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 17-18.

[539] "Experience shows that discrimination mainly occurs through administrative decisions taken in individual cases. In such cases, the law is not discriminatory *per se;* discrimination occurs through the administration of the law and the exercise of the discretion vested in immigration officers. Safeguards against discrimination are provided for in some countries where there are review or appeal procedures." Ibid., pp. 18-19.

[540] "The principle of *non-discrimination* has a long history in international law. It is now firmly rooted in several conventions and treaties of different scope and content, at different levels and between different State parties." Terje Einarsen, "Discrimination and Consequences for the Position of Aliens", *Nordic Journal of International Law*, vol. 64, 1995, pp. 429-452, at p. 430. "The practice of States confirms that the principle of non-discrimination has by now become a generally accepted principle of international law, and that previous discriminatory practices of States are no longer permissible." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 17. "In developing his conclusion that the norm of non-discrimination had become a rule of customary international law, Judge Tanaka observed that the concept of equality before the law and equal protection of the law was a feature common to many constitutions. This fact alone is some evidence of the acceptance of equality as a general principle of law, and it is additionally remarkable that many States do guarantee fundamental rights without distinction between citizens and aliens." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 83 (citations omitted).

[541] "It has been seen that modern covenants and conventions tend to propose three distinct elements as incidents of unlawful discrimination. There must be (1) a distinction, exclusion, restriction, or preference, which is (2) based on one or more of the specific grounds, such as race, colour, or religion, and which (3) has the purpose or effect of nullifying or impairing the enjoyment or exercise on an equal footing of the rights and freedoms which are guaranteed." Ibid.

265. The principle of non-discrimination figures prominently in the Charter of the United Nations.[542] It appears in the following provisions of the Charter: Article 1, paragraph 3,[543] Article 13, paragraph 1,[544] Article 55,[545] Article 62, paragraph 2,[546] and Article 76.[547] The principle of non-discrimination has been further developed in a number of human rights instruments adopted under the auspices of the United Nations, including the Universal Declaration of Human Rights[548], the

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[542] "The Charter of the United Nations, which entered into force in 1945, contains a significant number of references to 'human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. These somewhat general and to some extent promotional provisions have provided the background to the appearance of a substantial body of multilateral conventions and practice by the organs of the United Nations." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 546 (citation omitted). "The principle of non-discrimination, as a general rule of conduct by States, has been inscribed in the Charter of the United Nations which binds all Member States of the United Nations. Although the obligations in the Charter are very general, they have been made more specific in other United Nations documents relating to human rights, such as the 1965 International Convention on the Elimination of all Forms of Racial Discrimination and various regional documents." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 17.

[543] "The Purposes of the United Nations are: [...] 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion [...]".

[544] "The General Assembly shall initiate studies and make recommendations for the purpose of: [...] b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

[545] "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: [...] c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

[546] "[The Economic and Social Council] may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all."

[547] "The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be: [...] c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80."

[548] Article 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.") and article 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to

International Covenant on Civil and Political Rights[549] as well as the International Covenant on Economic, Social and Cultural Rights.[550]

266. The International Court of Justice has recognized protection from discrimination as a principle of international law. In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* case, the Court stated in its Advisory Opinion as follows:

> "Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."[551]

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equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination.")

[549] Article 2, para. 1: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *See* also article 4, para. 1: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."; article 24, para. 1: "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."; and Article 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[550] Article 2, paras. 2 and 3: "2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

[551] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding the Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 57, para. 131. See also Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 32, para. 34 (quoted below) and South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), second phase, I.C.J. Reports 1966, pp. 286-301 (Dissenting Opinion of Judge Tanaka); pp. 455-456, 464, 467-469 (Dissenting Opinion of Judge Padilla Nervo); and pp. 154-155, 158-172 (Separate Opinion of Judge van Wyk).

267. The principle of non-discrimination is enunciated in human rights instruments adopted at the regional level, such as the European Convention on Human Rights;[552] the American Convention on Human Rights;[553] the African Charter of Human and Peoples' Rights[554] and the draft Arab Charter on Human Rights.[555]

(f) Grounds for discrimination

268. There are several grounds for discrimination which have been recognized as contrary to the principle of non-discrimination to varying degrees, including race, sex, language, religion, alienage and national origin.[556]

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[552] Article 14 provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[553] Article 1, para. 1, provides: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." *See* also article 27, para. 1 ("In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin."), and article 24 ("All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.")

[554] Article 2: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. *See* also article 28: "Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."

[555] Draft Arab Charter on Human Rights, text adopted by the Arab Standing Committee for Human Rights, 5-14 January 2004, Article 3: "(a) Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability. (b) The States parties to the present Charter shall take the requisite measures to guarantee effective equality in the enjoyment of all the rights and freedoms enunciated in the present Charter so as to ensure protection against all forms of discrimination on any of the grounds mentioned in the preceding paragraph. (c) Men and women have equal human dignity and equal rights and obligations in the framework of the positive discrimination established in favour of women by the Islamic Shariah and other divine laws and by applicable laws and international instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter." [Translation from the Office of the United Nations High Commissioner for Human Rights. This document may be found at http://web.amnesty.org/library/Index/ENGMDE010022004?open&of=ENG-2MD (accessed 8 March 2006).]

[556] "The following are the most important pretexts for prejudice: race, colour, cultural circle, language, religion, national circle, social class (including caste, origin, educational and economic status, etc.), political or other

(i) Race

269. Racial discrimination has been described as a pernicious practice and a primary cause of the denial of human rights.[557]

> "There is indeed considerable support for the view that there is in international law today a legal principle of non-discrimination which applies in matters of race. This principle is based, in part, upon the United Nations Charter, especially Articles 55 and 56, the practice of organs of the United Nations, in particular resolutions of the General Assembly condemning apartheid, the Universal Declaration of Human Rights, the International Covenants on Human Rights, and the European Convention on Human Rights."[558]

270. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as follows:

> "Article 1
>
> "1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
>
> "2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
>
> "3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
>
> "4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such

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opinion, and sex." The Main Types and Causes of Discrimination, Memorandum submitted by the Secretary-General, E/CN.4/Sub.2/40/Rev.1, 7 June 1949, para. 58.

[557] "Throughout mankind's troubled history, the main cause of the denial of Human Rights has been the pernicious practices of racial discrimination." F. Y. Njenga, "The Role of the Untied Nations in the matter of Racial Discrimination", *Eastern Africa Law Review*, vol. 1, Tanzania, Faculty of Law, University of East Africa, 1968, pp. 136-157, at p. 136.

[558] Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 546 (citations omitted).

> measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."[559]

271. In 1970, the International Court of Justice recognized the prohibition of racial discrimination and characterized it as giving rise to an obligation *erga omnes* in the *Barcelona Traction* case. The Court stated as follows:

> "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[560]

272. It has been suggested that the prohibition of racial discrimination may constitute *jus cogens*.[561]

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[559] "The principle that 'all beings are born free and equal in dignity and rights' has now been universally accepted. The principle of 'equality' moreover implies that there should be no differentiation based upon factors over which the individual has no control such as, his race, his colour, his descent, and his national or ethnic origin. The broad and comprehensive definition of this principle has been incorporated in Article 1 of the International Convention on the Elimination of all forms of Racial Discrimination; 1965." R.C. Chhangani, "Notes and Comments. Expulsion of Uganda Asians and International Law", vol. 12, 1972, pp. 400-408, at p. 405 (citation omitted).

[560] Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 32, para. 34. See also South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), second phase, I.C.J. Reports 1966, pp. 286-301 (Dissenting Opinion of Judge Tanaka); pp. 455-456, 464, 467-469 (Dissenting Opinion of Judge Padilla Nervo) and pp. 154-155, 158-172 (Separate Opinion of Judge van Wyk).

[561] *See* Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, n. 68 (describing the meaning of the judgment of the Court in *Barcelona Traction* case (Second Phase) with respect to the obligations *erga omnes* as follows: "i.e. binding on all States and also having the status of peremptory norms (*jus cogens*)). "In racial matters, non-discrimination has a normative character and may be adjudged a part of *jus cogens*". Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 85.

(ii) Sex

273. The prohibition of discrimination based on sex[562] or gender[563] has been recognized in international law, regional law and national law.[564] The significant efforts of the international community to eradicate sex-based discrimination have been described as a vital contribution to the recognition of a general norm of non-discrimination.[565]

274. Sex has been included as a prohibited ground for discrimination in the Charter of the United Nations and in the major international instruments dealing with the principle of non-discrimination within the context of human rights in general,[566] in instruments specifically dealing with the

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[562] "In international law, sex discrimination encompasses any distinction, exclusion or restriction made on the grounds of gender which has the effect or purpose of impairing or nullifying the enjoyment of human rights on a basis of equality between men and women." Anne M. Trebilcock, "Sex Discrimination", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 390-396, at p. 390. *See*, in general, Rowena Daw, "Political Rights of Women: A Study of the International Protection of Human Rights", *Malaya Law Review*, vol. 12, 1970, pp. 308-336.

[563] "If written today, this entry would probably bear the title 'Gender aspects of international law' rather than 'Sex discrimination'. Gender analysis, i.e. examination of the formulation and impact of a policy or practice taking into account the different life experiences of women and men, has become a widely accepted methodology in many fields, thanks to developments at both the domestic and international levels. And if there really ever was any doubt, women's rights are now safely imbedded in human rights." Anne M. Trebilcock, "Sex Discrimination", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 390-396, at p. 394.

[564] "The particular norm against sex-based discrimination finds expression in many authoritative communications, at both international and national levels, and is rapidly being defined in a way to condemn all the great historic deprivations imposed upon women as a group. [...] On the regional level, sex is included among the impermissible grounds of differentiation in both the European Convention on Human Rights and the American Convention on Human Rights." Myres S. McDougal, Harold D. Lasswell and Lung-chu Chen, "Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination", *American Journal of International Law*, vol. 69, 1975, pp. 497-533, at pp. 497 and 526.

[565] "The drive toward eradication of sex-based discrimination, like that designed to eliminate racial discrimination, has in recent decades been a vital component of the trend toward a more general norm of nondiscrimination. The community concern for the protection of women, antedating the broader United Nations attack upon discrimination, was evident in certain significant areas at the turn of the twentieth century." Ibid., p. 509.

[566] *See* article 2, para. 1, of the Universal Declaration of Human Rights; article 2, para. 1, of the International Covenant on Civil and Political Rights; article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights; article 14 of the European Convention on Human Rights; article 1, para. 1, of the American Convention on Human Rights; article 2 of the African Charter on Human and Peoples' Rights; and article 3(c) of the 2004 draft Arab Charter on Human Rights. "The contemporary broad prescription against sex-based discrimination has its origins in the United Nations Charter and in various ancillary expressions and commitments. The more important general prohibitions of discrimination explicitly and consistently specify sex as among the impermissible grounds of differentiation." Myres S. McDougal et al., note 564 above, p. 510.

prohibition of discrimination against women,[567] as well as in other instruments dealing with the prohibition of gender discrimination in relation to particular rights.[568]

> "There is also a legal principle of non-discrimination in matters of sex, based upon the same set of multilateral instruments [the United Nations Charter, especially Articles 55 and 56, the practice of organs of the United Nations, in particular resolutions of the General Assembly condemning apartheid, the Universal Declaration of Human Rights, the International Covenants on Human Rights, and the European Convention on Human Rights], together with the Convention on the Elimination of All Forms of Discrimination against Women adopted by the UN General Assembly in 1979."[569]

275. The prohibition against sex-based discrimination has also been recognized in national constitutions and jurisprudence.[570] The prohibition of this type of discrimination was discussed in a decision of the United States Supreme Court in 1973 as follows:

> "Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility ...' And what differentiates sex from such non-suspect statuses as intelligence or physical

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[567] *See*, in particular, Convention on the Elimination of all Forms of Discrimination against Women (article 1: "For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."); and General Assembly resolution 2263(XXII), 7 November 1967 (Declaration on the Elimination of Discrimination against Women).

[568] *See*, for example, Convention on the Political Rights of Women, New York, 31 March 1953, United Nations, *Treaty Series*, vol. 193, No. 2613, p. 136. "The general norm against sex-based discrimination, thus formulated and established, is further illustrated and reinforced by a number of conventions and other authoritative expressions oriented toward the protection of women against particular vulnerabilities or in regard to particular values." Myres S. McDougal et al., note 564 above, p. 512.

[569] Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 546 (citations omitted).

[570] "The accelerating movement toward the reform of national constitutions to secure equal rights for women adds substance to transnational expectations in behalf of nondiscrimination ... As noted elsewhere, it is practically a universal pattern in national constitutions to prescribe a general form of equality, which typically condemns sex, along with race and other factors, as a basis of differential treatment. Many constitutions have gone further by enunciating separate provisions for equality of the sexes, explicitly highlighting equal rights for women as well as men." Myres S. McDougal et al., note 564 above, pp. 527-529 (citation omitted) (referring to the 1949 Constitution of the Federal Republic of Germany, the 1936 Constitution of the Union of Soviet Socialist Republics, the 1954 Constitution of the People's Republic of China, the 1967 Constitution of Paraguay and the 1972 Constitution of Egypt.)

> disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members ... With these considerations in mind, we can only conclude that classifications based upon sex like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[571]

(iii) Language

276. The prohibition of discrimination based on language is contained in the provisions of the main instruments concerning the protection of human rights mentioned previously. This prohibition has been further developed in international jurisprudence.[572]

(iv) Religion

277. Although racial and religious discrimination are among the oldest forms of discrimination and have often been intertwined throughout history, the prohibition of the former has been more fully developed than the latter in international instruments.[573] The absence of a common understanding of the notion of religion[574] as well as differences in the relationship between religion and various States have complicated efforts to more fully elaborate the prohibition of religious discrimination.

> "Religious discrimination was not covered by any of these instruments [relating to racial discrimination]. In 1962 a decision had been taken to draft separate instruments (a declaration and a convention; see UN GA Res. 1780 and 1781(XVII)). The work took twenty years. It was not easy to reach common ground between atheistic countries and those adhering to a religious faith and between countries with quite different relationships between religious and State authorities. Only after the intention to prepare a legally binding convention had been abandoned – a 1965 draft was rejected by the General Assembly in 1967 – was it finally

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[571] *Frontiero et Vir v. Richardson, Secretary of Defense Et Al.*, United States Supreme Court, 14 May 1973, Case No. 71-1694, 411 US 677, pp. 686-688 (citations omitted) (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

[572] See, in particular, European Court of Human Rights, Case relating to Certain Aspects of the Laws on the Use of Languages in Belgium, Judgment of 23 July 1968.

[573] "Religious and racial prejudices are phenomena as old as the history of mankind.... Frequently religious and racial intolerance coincided... Present international law regulates the two forms of discrimination with different intensity." Karl Josef Partsch, "Racial and Religious Discrimination", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 4-9, at p. 4.

[574] The Declaration on the Elimination of Religious Intolerance and Discrimination does not define the terms "religion" or "belief" used therein. See Donna J. Sullivan, "Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination", *American Journal of International Law*, vol., 82, 1988, pp. 487-520, at p. 491.

possible to find a consensus for a Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of November 25, 1981 (UN GA Res. 36/55). In this Declaration an attempt is made to define the legitimate forms of religious activities (Art. 6) without adding much to the relevant articles of the Human Rights Covenants. It has been characterized as a compromise with weaknesses and lacunae, but affirming at least that the 'right to express one's religious faith' is still 'a dimension of human existence' ..."[575]

278. Articles 2, 3 and 8 of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, adopted by the General Assembly on 25 November 1981, provide as follows:

> "Article 2
>
> 1. No one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or belief.
>
> 2. For the purposes of the present Declaration, the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief' and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis."
>
> "Article 3
>
> Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations."
>
> "Article 8
>
> Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights."[576]

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[575] Karl Josef Partsch, "Racial and Religious Discrimination", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 4-9, at pp. 5-6 (quoting the comment by the Observer for the Holy See at the thirty-sixth session of the General Assembly, A/C.3/36/SR.32, para. 28). *See,* in general, Donna J. Sullivan, "Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination", *American Journal of International Law,* vol., 82, 1988, pp. 487-520.

[576] General Assembly resolution 36/55.

279. The prohibition of religious discrimination has also been addressed in regional human rights instruments, including the European Convention on Human Rights; the American Convention on Human Rights; the African Charter of Human and Peoples' Rights and the draft Arab Charter on Human Rights.[577]

(v) Alienage

280. The right of a State to distinguish between its nationals and aliens is at the very foundation of the right of a State to expel aliens and the corresponding duty of a State to receive its nationals.[578] International law recognizes the possibility of differentiations between nationals and aliens,[579] as

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[577] See article 14 of the European Convention on Human Rights; article 1, para. 1, of the American Convention on Human Rights; article 2 of the African Charter on Human and Peoples' Rights; and article 3 of the 2004 draft Arab Charter on Human Rights.

[578] "Distinctions in the law generally between aliens and citizens, then, do not deny the former the equal protection of the laws if such discriminations are 'strictly necessary.' The rights recognized by the Covenant, however, explicitly apply to all persons subject to a state party's jurisdiction, aliens as well as citizens. A distinction between aliens and citizens is permitted only where explicitly provided, e.g., Article 25 (the right to vote and take part in public affairs), and Articles 12(4) and 13 (right of entry to one's country and freedom from expulsion)." B.G. Ramcharan, "Equality and Nondiscrimination", *in* Henkin, Louis (ed.), *The International Bill of Rights*, New York, Columbia University Press, 1981, pp. 246-269, at p. 263.

[579] "Aliens have been the object of discrimination since time immemorial." Richard B. Lillich, note 473 above, p. 343. "It is seldom seriously asserted that states cannot differentiate between nationals and aliens in ways that bear a reasonable relation to the differences in their obligations and loyalties. Thus, states reciprocally honor each other in accepting the lawfulness of a great variety of differentiations in permissible access to territory, participation in government, the ownership of important natural resources, and so on. Yet the principle would appear almost universally accepted that with respect to participation in many important social processes states cannot discriminate against aliens in favor of nationals in ways that have no substantial basis in the differences in their obligations and loyalties." Myres S. McDougal et al., note 475 above, p. 444 (citation omitted). "States do not in fact practice the purported rule of full equality to aliens. They do not open all occupations to them, for example, or allow them full political rights or even complete equality before the courts." Detlev Vagts, "Minimum Standard", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 3, 1997, pp. 408-410, at p. 409. "It is noteworthy that there is some authority for propositions which employ non-discrimination (on the basis of nationality) as a principle limiting the normal liberties of States in particular contexts, including expropriation, currency devaluation, taxation, and the export trade." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 548 (citations omitted). "Such [national] constitutions often prohibit discrimination against aliens." Vishnu D. Sharma and F. Wooldridge, "Some Legal Questions arising from the Expulsion of the Ugandan Asians", *International and Comparative Law Quarterly*, vol. 23, 1974, pp. 397-425, at p. 409 (citing article 14 of the Indian Constitution as an example). "On the general issue of equality, it remains for international law to answer the question whether alienage is, in the circumstances, a 'relevant difference' justifying differential treatment. The principle of non-discrimination expressly rules out certain types of distinction, and raises a very strong presumption of equality. The burden of proof lies on the party seeking to invoke exceptions to show objective justification and proportionality. It is this manner of proceeding which is prescribed by the general rule of international law, and an indication has been given of the way in which this and more detailed rules control the discretion which States may otherwise enjoy in their treatment of aliens." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 87 (citation omitted).

indicated in some international instruments.[580] These distinctions are, however, usually limited to certain rights such as voting and holding political office.[581]

"Classical international law does not therefore prevent discrimination by states between aliens and nationals on grounds of nationality. This approach was rejected mostly in human rights treaties of regional character." Hélène Lambert, note 83 above, p. 13.

[580] *See*, in particular, International Convention on the Elimination of All Forms of Racial Discrimination, article 1, para. 2 ("This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."); and International Covenant on Civil and Political Rights, article 13 (specifically dealing with the expulsion of aliens) and 25 ("Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country; Montevideo Convention on the Rights and Duties of States, article 9 (nationals and foreigners 'are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive that those of nationals.") "In the light of the major purposes of the Convention and the relevant context, it would appear clear that this provision was intended only to reserve to states a competence to continue to make the historic differentiations between aliens and nationals established as reasonable under customary international law. It was not intended as an oblique, new prescription that alienage is in general a permissible ground of discrimination. Differentiation on the basis of alienage in regard to such matters as voting and office-holding, as customarily accepted, continues to be permissible, but the standard of treatment accorded to aliens, as established under customary international law and the contemporary human rights law with respect to other values, is not to be diluted." Myres S. McDougal et al., note 475 above, p. 461 (citations omitted) (referring to art. 1(2) of the International Convention on the Elimination of Racial Discrimination).

[581] "The major human rights treaties acknowledge the inherent dignity and equal and inalienable rights of all. In respect of fundamental rights, they recognize no distinction between the national and the non-national, but do acknowledge the continuing authority of the state to maintain distinctions between citizens and non-citizens in certain areas of activity." Guy S. Goodwin-Gill, "Migration: International Law and Human Rights", *in* Bimal Ghosh (ed.), *Managing Migration,* Oxford University Press, 2000, pp. 160-189, at p. 167 (citations omitted). "This is the only place [article 21] in the Universal Declaration that a specified right is reserved for nationals only. This provision reflects only the long shared community expectation that differentiation on the basis of alienage is permissible in regard to participation in the making of community decisions, *i.e.,* voting and office-holding." Myres S. McDougal et al., note 475 above, p. 459 (citations omitted). "The second problem regarding equality before the law with respect to political rights was the question of voting rights for foreigners. In most countries, aliens are excluded from the right to vote and to stand in elections. There are, however, some countries where, after a certain period of residence, aliens may participate in local elections. Only certain South American states go further. For instance, Uruguay concedes a right to vote in national elections to foreigners who have resided for more than fifteen years in the country and fulfil certain other requirements. This, however, seems to be an exception. The recognition of political rights of aliens is not required by article 5(c). As mentioned above, the word 'everyone' in the introductory paragraph has to be interpreted on the basis of article 1, paragraph 2, according to which the Convention does not apply to distinctions and exclusions between citizens and non-citizens." Karl Josef Partsch, "Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights", *Texas International Law Journal*, vol. 14, 1979, pp. 191-250, at pp. 237-238 (citations omitted).

> "Yet, despite the general wording of recent conventions, discrimination which is based on nationality alone may still be permissible, at least within certain limits. For example, the State's duty to admit individuals is usually limited in favour of those who are its nationals, and it is widely accepted that aliens may be barred from the exercise of political rights, the ownership of certain property, and the holding of public office. State practice supports the lawfulness of such discriminations, although there is a tendency for States to accord each other's nationals greater equality in fact, as a result of extensive treaty obligations. The disadvantages of alienage were significantly reduced through the development of the standards of most-favoured-nation and national treatment in the commercial treaties of the seventeenth century and onwards, and here in the underlying principle of equality lie the origins of the norm of non-discrimination. Even in the absence of treaty, certain measures which discriminated against foreigners alone were unacceptable."[582]

281. The principle of non-discrimination limits the extent to which States can discriminate against aliens in certain respects.

> "The principle of non-discrimination imposes distinct limitations upon the liberty of States to deal with aliens. In racial matters, non-discrimination has a normative character and may be adjudged a part of *jus cogens*. In other matters involving distinctions against aliens in regard to property, to access to the courts, to entry, exclusion, and expulsion, the question to be asked is whether there is now a sufficient body of rules by which to determine whether the State's exercise of discretion is justifiable, or whether it amounts to unlawful discrimination. Distinctions in these areas purportedly based on alienage, or on the competence to deal with aliens at will, but which are in reality founded on racial grounds, are clearly barred by the general principle set out above. Even in other matters, alienage as the sole basis for distinctions must remain questionable, and it has been the object of both treaties and international practice to prevent injurious discriminations against aliens generally." [583]

(vi) National origin

282. National origin is not mentioned as a prohibited ground for discrimination in the relevant provisions of the Charter of the United Nations. Nonetheless, the International Court of Justice has recognized that "to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of … national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter." [584]

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[582] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 83-84 (citations omitted).

[583] Ibid., pp. 85-86 (citations omitted) (referring to *Hines* v. *Davidowitz* 312 U.S. 52 (1941), per Black J. at p. 65).

[584] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding the Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 57, para. 131.

283. The prohibition of discrimination based on national origin is recognized in the Universal Declaration of Human Rights and in several international treaties.[585] In this regard, the International Convention on the Elimination of All Forms of Racial Discrimination includes the criterion of "national or ethnic origin" in the definition of racial discrimination contained in article 1. Paragraph 3 of this provision further provides: "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality." There is some question as to the meaning of the term "national or ethnic origin"[586] and the effect of this provision.[587] There is also some question as to the extent to which this type of discrimination is prohibited.[588]

(vii) Other types of discrimination

284. The prohibition of discrimination on the grounds set forth in the Charter of the United Nations and the Universal Declaration of Human Rights[589] was not intended to be exhaustive.[590] The principle

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[585] *See* article 2, para. 1, of the Universal Declaration of Human Rights; article 2, para. 1, of the International Covenant on Civil and Political Rights; article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights; article 14 of the European Convention on Human Rights; article 1, para. 1, of the American Convention on Human Rights; article 2 of the African Charter on Human and Peoples' Rights; and the 2004 draft Arab Charter on Human Rights.

[586] "The criteria of 'national or ethnic origin' present the same difficulties as the term 'people'. Are tribes, castes and similar social groups included? The question is controversial." Karl Josef Partsch, "Racial and Religious Discrimination", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 4-9, at p. 4.

[587] "In the light of the discussions during drafting, it seems clear that, according to article 1, paragraph 2, which has to be applied in interpreting the word 'everyone' in article 5, the concession of privileges to the citizens of a certain foreign state on the grounds of nationality is not incompatible with the provisions of the Convention. If the Convention does not apply to preferences based on citizenship, a differential treatment of citizens of different states remains legitimate. If all aliens were to have been treated in the same way, which would exclude the application of the most favored nations clause, this should have been expressly stated in the Convention in order to exclude the application of a general principle of international law." Karl Josef Partsch, "Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights", *Texas International Law Journal*, vol. 14, 1979, pp. 191-250, at p. 228 (citation omitted).

[588] "A fairly respectable number of international lawyers have contended that it is unlawful for a state to discriminate between aliens of different nationalities. Admittedly, there is no consensus among international lawyers on the meaning and scope of the obligation to avoid discrimination as between aliens." K.C. Kotecha, "The Shortchanged: Uganda Citizenship Laws and How they were applied to its Asian Minority", *International Lawyer*, vol. 9, 1975, pp. 1-29, at p. 25.

[589] "The addition of 'other status' in the Universal Declaration to the list of criteria is in keeping with the exemplary and not exhaustive character of this list ('any discrimination such as ...'). Karl Josef Partsch, "Discrimination Against Individuals and Groups", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1079-1083, at p. 1083.

[590] "It may be recalled that though the United Nations Charter enumerates only four specific grounds of impermissible differentiation—race, sex, language, and religion—these are intended to be illustrative and not

of non-discrimination may apply to other grounds recognized as inadmissible by the international community. For example, the possibility of extending this principle to include discrimination based on alienage has been considered above. The extent to which this or other grounds are recognized as being covered by the principle of non-discrimination as a matter of international law is unclear. It is sufficient to note for present purposes that the enumeration of impermissible grounds discussed in relation to the principle of non-discrimination is not intended to be exhaustive or to rule out the possible recognition of other grounds in the future.

(g) Relevance of the principle of non-discrimination to the expulsion of aliens

285. The expulsion of aliens contrary to the principle of non-discrimination may constitute a violation of international law.[591] In 1987, the Iran-United States Claims Tribunal recognized the wrongfulness of the discriminatory expulsion of aliens, without providing further detail, as follows: "A claimant alleging expulsion has the burden of proving the wrongfulness of the expelling State's action, in other words that it was arbitrary, discriminatory, or in breach of the expelling State's treaty obligations."[592]

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exhaustive. The more detailed formulation in the Universal Declaration of Human Bights makes this abundantly clear." Myres S. McDougal et al., note 475 above, p. 458 (citation omitted).

"While it can be argued that non-discrimination as a general principle or rule is confined to distinctions drawn on the basis of race alone, there is now considerable evidence for the view that, as a standard of international law, non-discrimination is drawn on a wider scale." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 75. "The number of factors which cannot be used for discrimination purposes is constantly increasing." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 17.

[591] "To complete this account of types of 'causes of action' it is worth looking at some recent developments of customary international law. One such development, which is now firmly established, is the principle of non-discrimination, which applies in matters of race and sex but no doubt also applies to a variety of arbitrary acts arising from religious and other social prejudices. The evidence for the view that the principle is a part of general international law is available elsewhere. In brief, the principle represents a contribution to the law arising from concepts of human rights. The relevance of the principle is considerable. Where a state acts within what is *prima facie* a right, power, or privilege, but there is evidence that the precise occasion or mode of exercise of the right, etc., was based upon a selection contrary to the principle of non-discrimination, responsibility will arise on the ground of unlawful discrimination. Acts of expulsion, or taxation, for example, which would normally be lawful (it is assumed) would, in this case, constitute breaches of the principle of non-discrimination." Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part I, Oxford, Clarendon Press, 1983, p. 81 (citations omitted). *See* also Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 104.

[592] *Rankin v. The Islamic Republic of Iran,* note 136 above, p. 142, para. 22. "It would be reasonable to suppose that arbitrary discrimination in the exercise of the power to expel aliens would be unlawful. There are two issues in such cases. First, whether the particular liberty is subject to limitation of this type: if the particular standard of non-discrimination is *jus cogens* (as in racial discrimination), the answer will be affirmative. Secondly, whether standards have developed for determining the distinction between lawful differentiation and unlawful, arbitrary, discrimination." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press,

286. The principle of non-discrimination may be relevant to a determination of the lawfulness of the expulsion of aliens in three respects. First, the principle of non-discrimination would prohibit the expulsion of individual aliens based solely on the grounds of race, religion, sex, language or any other criteria covered by this principle. Secondly, the principle of non-discrimination would prohibit failure to comply with the substantive and procedural requirements for a lawful expulsion on such grounds.[593] Thirdly, the principle of non-discrimination may be of particular relevance to the prohibition of collective expulsions.

3. Principle of legality

287. The principle of legality requires that the expulsion of aliens be the result of a decision reached in accordance with law.[594] This principle of international law requires that the expulsion of an alien be decided by the competent authority by means of a decision reached in accordance with the national law of the State concerned.[595] The principle of legality may apply to the substantive as well as

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2003, pp. 548. "Where discriminatory expulsions have some objective basis, and are not a disproportionate measure in the given circumstances, they are not apparently contrary to the [Universal] Declaration. This follows from Article 29 (2) thereof … This article finds many parallels in national constitutions and in the European Convention of Human Rights. It provides: 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law, solely for the purpose of securing due recognition and respect for the rights and freedoms of others, and of meeting the just requirements of morality, public order and the general welfare in democratic society.'" Vishnu D. Sharma and F. Wooldridge, note 579 above, p. 409, n. 75.

[593] "Implementation is the task of various organs. As far as clauses regarding racial or religious discrimination are contained in general instruments for the protection of human rights, reference must here be made to the pertinent organizations and conventions. Most such clauses prohibit discrimination only in connection with a breach of the rights set forth in the instruments and have no 'independent existence' (Judgment of the European Court of Human Rights, July 23, 1968 (Belgian Linguistic Cases), Series A6, p. 33)." Karl Josef Partsch, "Racial and Religious Discrimination", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 4-9, at pp. 6-7. "The principle or norm of non-discrimination has figured prominently in modern attempts to secure the better protection of fundamental human rights. Rights such as the right to life, liberty, and security of the person and the right to equality before, and equal protection of the law, clearly allow for no distinction between nationals and aliens. Yet it is apparent that both general international law and recent conventions foresee continued distinctions between these two groups. The 'basic rights' of the alien may be assured, but it is a matter for debate to what extent his other rights and interests may be restricted." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 75 (citation omitted).

[594] "General international law imposes as a precondition to the validity of an order of expulsion the requirement that it be made in accordance with law." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 308.

[595] "The expulsion must, in the first instance, be permitted by the local law, and, further, be effected only in pursuance of a decision reached in accordance with law. The latter requirement precludes arbitrariness and is derived directly from the standards of general international law." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 263. "Arbitrary expulsions … in violation of the provisions of municipal law … have given rise to diplomatic claims and to awards by arbitral commissions … In several cases against Venezuela one of the principal allegations in the successful contention of the claimant government was that the expulsion of a domiciled alien (by Venezuelan law, an alien residing

the procedural requirements for the lawful expulsion of aliens.[596] In addition, the principle of the supremacy of international law requires that the national law[597] and jurisprudence[598] of a State be consistent with international law.[599]

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there for two years or more) was in violation of her municipal law. The violation by a government of its own municipal law to the prejudice of an alien is always considered a valid ground for a claim." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, pp. 57-58 (citations omitted).

[596] "However, the right to expel or deport, like the right to refuse admission, must be exercised in conformity with generally accepted principles of international law, especially international human rights law, both substantive and procedural, and the applicable international agreements, global, regional and bilateral. Consequently, in exercising the right to expel or deport, a State must observe the requirements of due process of law, international and domestic ('in accordance with its laws and regulations'); its officials must not act arbitrarily or abuse the powers granted to them by their national law, and in all instances they must act reasonably and in good faith." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 89. "That expulsion should be in accordance with the local law expresses also the rule which is prescribed by international law, and it is essential that the further consequences of that rule should not be ignored. Thus, the local law is required to conform with the standards of international law: it must not therefore offend against the norm of non-discrimination, and may not permit the use of expulsion as an instrument of genocide, persecution, or confiscation. The prescriptive requirement of decisions in accordance with the law necessarily implies that the discretion is confined and that decisions are controlled by the law. A full appeal on the merits, or even some special administrative tribunal which hears representations, may not be demanded, especially in political and security matters where the executive enjoys the widest margin of appreciation. But the rule of international law requires that there be available some procedure whereby the underlying legality of executive action can be questioned, such as the writ of habeas corpus in common-law jurisdictions. The additional requirement of a hearing on the merits or of an opportunity to make representations, although commonly found in municipal systems, cannot be said to have gained recognition as a rule of international law. The principle, however, may be offered *de lege ferenda*. But there can be no doubt that the first rule, which denies the arbitrary and capricious nature of expulsion, is to be accepted *de lege lata*." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 275 (citations omitted). See also Giorgio Gaja, note 28 above, p. 297.

[597] "Additionally, in the case concerning *Certain German Interests in Polish Upper Silesia (Merits)* the Court, impliedly, if indeed not expressly, rejected the national treatment doctrine and 'recognized the existence of a common or generally accepted international law respecting the treatment of aliens and which is applicable to them despite municipal legislation.'" Richard B. Lillich, note 473 above, p. 353 (citations omitted). "A State which in the process of expelling an alien from its territory has recourse to methods that violate its own constitution, is regarded by the United States as guilty of internationally illegal conduct." Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 233 (citation omitted).

[598] "A State is liable for the practice and jurisprudence of its courts even if under the State's own domestic law the courts are not subject to executive power and the decisions cannot be altered once they have entered into force." Stephan Verosta, "Denial of Justice", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1007-1010, at p. 1007.

[599] "Governing Rule 12 Expulsion or Deportation of Aliens: A State may expel or deport an alien only in accordance with its laws and regulations and in conformity with generally accepted principles of international

288. The principle of legality with respect to the expulsion of aliens has been recognized in international jurisprudence. In the *Boffolo Case*, the Umpire considered that reasons contrary to the Constitution of the expelling State could not be accepted as sufficient in order to justify an expulsion.

> "In the present case the only reasons suggested to the Commission would be contrary to the Venezuelan constitution, and as this is a country not of despotic power, but of fixed laws, restraining, among other things, the acts of its officials, these reasons (whatever good ones may in point of fact have existed) can not be accepted by the umpire as sufficient".[600]

289. The principle of legality has also been recognized in a number of treaties with respect to aliens lawfully present in the territory of a State, including the International Covenant on Civil and Political Rights; the American Convention on Human Rights; the African Charter on Human and Peoples' Rights; Protocol No. 7 to the 1984 European Convention on Human Rights; and the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families. Article 13 of the 1966 International Covenant on Civil and Political Rights provides as follows:

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law …".[601]

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law and applicable international agreements. This governing rule enunciates two basic norms: firstly, deportation or expulsion should occur only in accordance with the laws and regulations of the State and, secondly, such laws and regulations should conform to generally recognized rules of international law." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 89. "Possible limitations upon the power of expulsion can be seen in the provisions of certain municipal systems. … Indeed, it may be that the large measure of discretion which municipal systems concede to their respective executive authorities makes it less than usually possible to presume opinio juris on the basis of actual practice. Nevertheless, there can be no doubt of the important influence which the standards of international law have had on the manner of exercise of the power and on the development of the principle that decisions in such matters be 'in accordance with law'." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 237. "It might appear at first sight that modern perceptions of the limitation are scarcely more precise. The Covenant on Civil and Political Rights states that 'An alien lawfully in the territory of a state party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law'. … For example, the mere application of first principles will lead us to conclude that in the passage cited above the word 'lawfully' and the phrase 'in accordance with law' refer prima facie to domestic law. Principle will demand, nonetheless, that these terms should be construed as relating to international law when the domestic and international rules are in conflict." Richard Plender, "The Ugandan Crisis and the Right of Expulsion under International Law", *The Review: International Commission of Jurists*, No. 9, 1972, pp. 19-32, at pp. 23-24.

[600] *Boffolo Case*, note 381 above, p. 537.

[601] International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 4668, p. 171. Similar wording is contained in article 7 of the declaration annexed to General Assembly Resolution 40/144 (Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live, 13 December 1985), which provides: "An alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law …".

Article 22, paragraph 6, of the 1969 American Convention on Human Rights provides as follows:

> "An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law."[602]

Article 12, paragraph 4, of the 1981 African Charter on Human and Peoples' Rights provides as follows:

> "A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law."[603]

Article 1, paragraph 1, of Protocol No. 7 to the 1984 European Convention on Human Rights provides as follows:

> "An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law ..."[604]

290. The same principle is enunciated in article 22, paragraph 2, of the 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families in the following terms: "Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law." According to this provision, the principle of legality may be interpreted as including the requirement that a decision on expulsion be taken by an authority which is competent therefor according to the legislation of the expelling State.[605]

291. The principle of legality has also been recognized in principles and recommendations adopted by international organizations. In 1961, the Asian-African Legal Consultative Committee adopted principles emphasizing the requirement of legality in relation to the adoption of an expulsion or deportation order, the measures intended to ensure the enforcement of such order and the penalties which may be imposed on an individual who does not comply with the order.

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[602] American Convention on Human Rights, "Pact of San José, Costa Rica", San José (Costa Rica), 22 November 1969, United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123.

[603] African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.

[604] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984, *European Treaty Series*, No. 117.

[605] International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, note 266 above. Similarly, Special Rapporteur F. V. García Amador suggested in a draft article a formulation of the principle of legality which referred to the grounds for the expulsion as well as the procedure: "The State is responsible for the injuries caused to an alien who has been expelled from the country, if the expulsion order was not based on grounds specified in municipal law or if, in the execution of the order, serious irregularities were committed in the procedure established by municipal law." International Law Commission, International responsibility, Sixth report by F. V. García Amador, Special Rapporteur (Responsibility of the State for injuries caused in its territory to the person or property of aliens – Reparation of the injury), *Yearbook of the International Law Commission*, 1961, vol. II, A/CN.4/134 and Addendum, pp. 1-54, Art. 5, para. 1.

> "A State shall have the right to order expulsion or deportation of an undesirable alien in accordance with its local laws, regulations and orders.
>
> …
>
> "If an alien under orders of expulsion or deportation fails to leave the State within the time allowed, or, after leaving the State, returns to the State without its permission, he may be expelled or deported by force, besides being subjected to arrest, detention and punishment in accordance with local laws, regulations and orders".[606]

292. In 1975 the Parliamentary Assembly of the Council of Europe adopted a recommendation providing that the principle of legality with respect to the grounds for an expulsion should also apply to measures taken against aliens unlawfully present in the territory of a State.

> "An alien without a valid residence permit may be removed from the territory of a member state only on specified legal grounds which are other than political or religious.
>
> "… The grounds for expulsion shall be established limitatively by law."[607]

293. As for other international bodies, the Institut de Droit international emphasized the importance of the principle of legality in relation to the expulsion of aliens in a number of respects in a regulation adopted in 1892:

> "It is desirable that the admission and deportation of aliens should be governed by laws".[608]
>
> "Each State must establish, through laws or regulations published sufficiently in advance of their entry into force, rules for the admission or movement of aliens."[609]

294. States may be given broad discretion in the application of their national law. This is the approach that has been taken by the Human Rights Committee as well as the European Commission and the European Court.

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[606] Principles, note 369 above, article 16, paras. 1 and 3.

[607] Council of Europe, Parliamentary Assembly, Recommendation 769 (1975) on the legal status of aliens, 3 October 1975, *Principles on which a uniform aliens law in Council of Europe member states could be based*, paras. 9-10.

[608] Institut de Droit international, Droit d'admission et d'expulsion des étrangers, Huitième Commission d'étude, Extrait du procès-verbal des séances des 8 et 9 septembre 1892, présidées par M. Albéric Rolin, vice-président, *Annuaire de l'Institut de Droit international*, Douzième volume, 1892-1894, session de Genève, septembre 1892, pp. 184-226, at p. 219.

[609] Ibid., p. 220.

"This approach was taken by the Human Rights Committee in its views in *Maroufidou v. Sweden:*

> 'The reference to "law" in this context is to domestic law of the State party concerned, which in the present case is Swedish law, though of course the relevant provisions of domestic law must in themselves be compatible with the provisions of the Covenant.'

"It would be difficult for a supervisory body to make a full review of the way in which municipal authorities have applied the legal rules of their respective State. As a consequence, the reference in Article 13 of the UN Covenant to the requirements set out by municipal law is somewhat restricted. In the case quoted above, the Committee added what has come to be called the 'Maroufidou formula':

> 'The Committee takes the view that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned. It is not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly in the case before it under the Optional Protocol, unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power.'

"The Committee appears to have gone beyond this type of assessment only in the *Hammel v. Madagascar* case. The circumstances were rather exceptional, because expulsion of the applicant – a lawyer – was justified by the Malagasy Government also as a sanction of the individual's role in helping other persons with their communications to the Committee:

> 'The Committee further notes with concern that, based on the information provided by the State party [...] the decision to expel Eric Hammel would appear to have been linked to the fact that he had represented persons before the Human Rights Committee. Were that to be the case, the Committee observes that it would be both inevitable and incompatible with the spirit of the International Covenant on Civil and Political Rights and the Optional Protocol thereto, if States parties to these instruments were to take exception to anyone acting as a legal counsel for persons placing their communications before the Committee for consideration under the Optional Protocol.'

"It is noteworthy that this passage refers to the Covenant and the First Optional Protocol in general and not to Article 13. […]

"Both the European Commission and the European Court of Human Rights … – like the Human Rights Committee – have reviewed compliance with national legislation only to a limited extent. In the *Bozano* case the Court stated that:

> 'Where the Convention refers directly hack to domestic law, as in Article 5, compliance with such law is an integral part of Contracting States 'engagements' and

> the Court is accordingly competent to satisfy itself of such compliance where relevant (Article 19); the scope of its task in this connection, however, is subject to limits inherent in the logic of the European system of protection, since it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law [...]'
>
> "When, as in the *Bozano* case, national courts have, albeit incidentally, questioned the conformity of a given measure to national legislation, the Court has found it possible to conclude that expulsion and consequently detention were not lawful:
>
> 'Even if the arguments of those appearing before the Court and the other information in the file are not absolutely conclusive in the Court's view, they provide sufficient material for the Court to have the gravest doubts whether the contested deprivation of liberty satisfied the legal requirements in the respondent State.'
>
> "Moreover, like the Human Rights Committee, also the European Court has asserted that its review is not restricted to compliance of a measure with national legislation because 'lawfulness', in any event, also implies absence of any arbitrariness."[610]

C. The continuing relevance of general limitations

295. As a result of extensive State practice with respect to the expulsion of aliens over time, it may be possible to identify the emergence of more specific standards by reviewing the relevant international jurisprudence, treaty law and national law and jurisprudence.[611] Since the mid-twentieth

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[610] Giorgio Gaja, note 28 above, pp. 297-299 (quoting Views adopted on 9 April 1981, Communication No. R 13/58, *Report of the Human Rights Committee,* Doc. A/36/40 160 at 165 (paras. 9.3 and 10); Views adopted on 3 April 1987, Communication No. 155/1983, *Report of the Human Rights Committee,* Doc. A/42/40 130 at 138; and Judgement of 18 December 1986, *Publications of the European Court of Human Rights,* Series A, Vol. 111 at 25 (para. 58), respectively).

[611] There are different views concerning the extent to which international law provides specific standards with respect to the expulsion of aliens. The view has been expressed that more specific rules concerning the expulsion of aliens may be found in contemporary international law. "In recent years it has become increasingly apparent, however, that the right of expulsion is subject to significant restrictions imposed by public international law." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 459 (citation omitted). "An analysis of expulsion in the practice of States reveals that general international law is by no means silent as to the limits within which this power may be exercised. It is a power which is essentially discretionary, and international law operates to prescribe the extent of the power, and to regulate its manner of exercise. It is possible to go further now in the description of those limits than the somewhat generalized conclusions most usually found, for example, to the effect that the power of expulsion must not be exercised 'arbitrarily', 'unjustly', or 'without consideration'." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States,* Oxford, Clarendon Press, 1978, p. 307. In contrast, the view has also been expressed that international law does not provide specific rules governing the expulsion of aliens, the lawfulness of which must be considered on a case-by-case basis. "On the other hand, while a state has a broad discretion in exercising its right to expel aliens, its discretion is not absolute. Thus, by customary international law it must not abuse its right by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion. Beyond this, however, customary international law provides no detailed rules regarding expulsion,

century, State practice with respect to this field of international law has developed considerably due to the significant increase in the international movement of persons facilitated by improved means of transportation. Today many States have detailed laws governing the expulsion of aliens and a substantial body of jurisprudence interpreting and applying those laws. International and regional organizations have also contributed to the development of more specific rules relating to the expulsion of aliens by means of treaty law and international jurisprudence. It should be noted that State practice at the national or regional level may vary in certain respects.

296. This is not, however, to suggest that the traditional limitations on the expulsion of aliens would not be of continuing relevance to the determination of the lawfulness of the expulsion of aliens. These classic principles of international law are still recognized in contemporary international law and continue to provide a relevant standard for the conduct of States in various fields of activity. These general principles may still provide the relevant standard for determining the lawfulness of the expulsion of an alien in the absence of a more specific standard. Whereas the traditional limitations may be viewed as customary international law, the contemporary standards may have their origins in treaty law.

297. The more specific standards may emerge from extensive State practice in this field or international human rights law. [612] These specific standards may be viewed to some extent as a refinement of the prohibition of abuse of rights, the principle of good faith and the prohibition of arbitrariness and as a further step in the development of the law governing the treatment of aliens.

298. The relevant rules of contemporary international law governing the expulsion of aliens will be considered with respect to (1) the grounds and other considerations relating to the expulsion decision;[613] (2) the procedural requirements;[614] and (3) the implementation of the decision (voluntary departure or deportation).[615]

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and everything accordingly depends upon the merits of the individual case." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 940-941 (citation omitted).

[612] "When implemented, expulsion is a drastic instrument, that seriously impinges on the situation of the individual concerned. Thus the need to find some protection for individuals under international law has emerged." Giorgio Gaja, note 28 above, p. 289. "However, the right to expel or deport, like the right to refuse admission, must be exercised in conformity with generally accepted principles of international law, especially international human rights law, both substantive and procedural, and the applicable international agreements, global, regional and bilateral." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 89.

[613] *See* Part VII.

[614] *See* Part VIII.

[615] *See* Part IX. "In the great majority of cases, while admitting the general right of the State to expel aliens, international tribunals stressed at the same time the limitations of this right either in regard to the expulsion itself or to the procedure accompanying it." Hersch Lauterpacht (ed.), *The Function of Law in the International Community,* Oxford, Clarendon Press, 1933, p. 289.

VII. GROUNDS AND OTHER CONSIDERATIONS RELATING TO THE EXPULSION DECISION

A. Grounds for expulsion

1. Requirement of a valid ground for expulsion

299. The expulsion of an alien has been described as a drastic measure which requires substantial justification.[616] This fundamental requirement for the lawful expulsion of aliens was previously recognized to some extent under the general limitations on the expulsion of aliens relating to abuse of rights, good faith[617] and arbitrariness. Different terms may be used to describe this condition for a lawful expulsion including a valid ground,[618] justification,[619] cause,[620]

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[616] "Expulsion is a drastic measure which, by its very nature, presupposes substantial justification." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 231.

[617] "The insistence upon justification or reasonable cause which is so clearly common to these different cases emphasizes again the manner in which the competence to expel may be substantially confined; in this instance, by operation of the principle of good faith. More precise limitations will be seen to follow as a consequence of other factors, notably the impression of the concept of 'ordre public' and the influence of international standards of treatment." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 232.

[618] "An examination of diplomatic and judicial practice, principally during the last century, permits us to identify four main sets of limitations of this kind. The first group relate to the grounds of expulsion ..." Richard Plender, "The Ugandan Crisis and the Right of Expulsion under International Law", *The Review: International Commission of Jurists,* No. 9, 1972, pp. 19-32, at p. 24.

[619] "In 1907 the United States Secretary of State declared that 'The Government of the United States neither questions nor denies the existence of the sovereign right to expel an undesirable resident. It cannot be overlooked, however, that such a right is of a very high nature and that *justification must be great and convincing*.'" Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 460 (citing III Hackworth's *Digest* 690 (emphasis added)).

[620] "[A] State engages international responsibility if it expels an alien without cause... [...] D. O'Connell in *International Law,* 1970, vol. II, p. 707, states that the requirement that the expelling State prove its legitimate grounds for deportation has not been persisted in, and the tendency has been to allow States a general competence to allow aliens to leave, but to engage them in international responsibility with respect to the manner of expulsion. It is thought, however, that the paucity of convincing modern evidence on this issue reflects only the fact that States seldom expel aliens without advancing some cause." Ibid., pp. 459 and 478-479, n. 20. "The classical writers acknowledged a power to expel aliens but often asserted that the power may be exercised only for cause. Grotius wrote of the sovereign right to expel aliens who challenge the established political order of the expelling State and indulge in seditious activities there. Pufendorft echoed this sentiment. In early diplomatic correspondence the same principle is expressed with the same qualification." Ibid., p. 461 (citing H. Grotius, *De Jure ac Pacis, Libri Tres,* 1651, Book II, Chap. II, p. xvi; S. Pufendorf, *De Jure Naturae et Gentium, Libri Octo,* 1866, Book III, Chap. III, para. 10.). "An expulsion without cause ... has been held to afford a good title to indemnity." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1915, p. 57.

reason[621] or purpose.[622]. The Commission may wish to consider the most appropriate term to use to describe this requirement. The term "ground" is used for purposes of the present study.

300. The requirement of a valid ground for the expulsion of an alien may be viewed as a specific substantive requirement for the lawfulness of such an expulsion.[623] This requirement has been recognized in a series of arbitral awards as well as national jurisprudence.

301. In the *Lacoste Case*, the need for a valid ground was stressed with respect to a situation involving foreign invasion. Thus, according to the Commission which delivered the award, an expulsion should not take place "without good cause shown":

> "Lacoste further claims damages for his arrest, imprisonment, harsh and cruel treatment, and expulsion from the country. […] With regard to the expulsion of the claimant from the country, it must be remembered that, owing to the French invasion, the President of Mexico was invested with great and extraordinary powers; *and although such powers ought not generally to be exercised for the expulsion of foreigners without good cause shown*, the case is different where the foreigner is a countryman by birth of the invaders and conceals, as the claimant appears to have done, the fact that he had adopted the United States as his country."[624] [Emphasis added.]

302. In the *Paquet Case*, the Umpire emphasized the requirement that there be a valid ground for an expulsion by stating that expulsion should only be resorted to for reasons related to the preservation of public order or for "considerations of a high political character":

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[621] "The rule appears to be that the expelling State must, if required to do so by the State of nationality, advance a reason for the expulsion, which could reasonably and properly lead it to the conclusion that such an action is warranted in the public interest." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 461. "To minimize the harsh and arbitrary use of the power, numerous treaties between states stipulate that the subjects of the contracting parties shall not be expelled except for reasons of weight…" Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 56.

[622] "The expulsion or deportation of non-citizens is likewise a matter of sovereign competence, but the discretion must be exercised in good faith and not for an ulterior motive… In each case, the purpose is relevant. It may be difficult to draw the line between clear instances of unlawful purposes, and instances where the harm to individuals is incidental to the practice; but the line is there." Guy S. Goodwin-Gill, note 433 above, p. 99.

[623] "An expelling State does not discharge its liability by advancing its reasons accurately and with sufficient particularity, unless the reasons so advanced could properly lead it to the conclusion that the expulsion was justified." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 462. "[A] statement of reasons given voluntarily by the deporting state may reveal that the deportation was arbitrary and therefore illegal, as was the case, for example, when the Asians were expelled from Uganda in 1972." Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed., London/New York, Routledge, 1997, p. 262.

[624] *Lacoste v. Mexico* (Mexican Commission), Award of 4 September 1875, in John Bassett Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party, vol. IV, pp. 3347-3348.

> "[…] the right to expel foreigners from or prohibiting their entry into the national territory is generally recognized; […] each State reserves to itself the exercise of this right with respect to the person of a foreigner if it considers him dangerous to public order, or for considerations of a high political character, but that its application *can not be invoked except to that end*."[625] [Emphasis added.]

303. In the *Boffolo Case*, the requirement of a valid ground for expulsion was also affirmed. The Umpire, while recognizing the existence of "a general power to expel foreigners, at least for cause,"[626] indicated that "expulsion should only be resorted to in extreme instances."[627]

304. The need for good cause or justification was also mentioned in the arbitral award that was delivered in the *Tacna Arica Question*:

> "How many of these formal or informal expulsions were based on good cause it is impossible to say on the record presented, but it is reasonable to conclude that aside from the conscription cases there were also other cases in which justification could not successfully be established."[628]

305. The requirement of a valid ground for the expulsion of an alien has also been recognized in national jurisprudence.[629]

2. Margin of appreciation

306. The right of a State to expel aliens when there are valid grounds for doing so is recognized in the national laws of a number of States.[630] The competent national authorities under the relevant

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[625] *Paquet Case (Expulsion)*, Mixed Claims Commission Belgium-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. IX, pp. 323-325, at p. 325 (Filtz, Umpire).

[626] *Boffolo Case*, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 528-538, at p. 531.

[627] Ibid., p. 537.

[628] Tacna-Arica Question (Chile/Peru), Award of 4 March 1925, United Nations, Reports of International Arbitral Awards, vol. II, pp. 921-958, at pp. 942-943.

[629] For example, the Court of Cassation of Costa Rica pointed out in *Hearn v. Consejo de Gobierno* that expulsion in absence of a valid ground could constitute an "unfriendly act" among States. *Hearn v. Consejo de Gobierno,* Court of Cassation of Costa Rica, 17 September 1962, *International Law Reports*, volume 32, E. Lauterpacht (ed.), pp. 257-260 ("This provision [Article 6 of the Havana Convention] was indubitably adopted by the High Contracting Parties in order to avoid an unfriendly act, such as would occur were States to expel any person from their territory merely on the basis of his status as an alien.").

[630] "Municipal law accepts that, whether it be a civil or a criminal proceeding, deportation is a severe penalty which must be founded on serious reasons…." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 308-309. "Although the United States is unusual in

national law of the State concerned usually make the initial determination as to whether there is a valid ground for expelling an alien. This requires the determination of whether the continuing presence of an alien is contrary to the interests of the territorial State.[631]

307. States appear to enjoy a wide margin of appreciation or a broad degree of discretion in making such a determination. It has been noted that to some extent a margin of discretion is inherent in the application of any law. However, this would appear to be particularly true with respect to expulsion cases when the national authorities are called upon to consider the continuing presence of an alien in relation to the interests of the territorial State. This element of discretion is also recognized, at least implicitly, as a matter of treaty law.[632] The determination by the territorial State of its interests with respect to the presence of an alien in its territory would not necessarily be invalid simply because the State of nationality of the alien was not of the same view.

308. The discretion of the territorial State with respect to the finding of grounds for the expulsion of aliens is not, however, unlimited.[633] States whose nationals have been expelled have challenged the lawfulness of the expulsions based on the absence of valid grounds in a number of cases. In some cases, international tribunals and commissions have found the expulsion of aliens to be unlawful due to insufficient grounds.[634] However, it has been suggested that a ground which is *prima facie*

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the precision with which it identifies the grounds for an alien's expulsion and for relief from that process, few States assert in their domestic laws a power to deport aliens without cause." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 467.

[631] "As regards both the grounds for expulsion and the separate question of whether an individual qualifies within those grounds, the expelling State is in the best position, and is, indeed, the only authority competent to pronounce upon such matters. Practice accepts that it is for each State to determine whether the continued residence of aliens is desirable. ... And yet the liberty is not complete. Rules of international law stand at the perimeter and occasionally pass through to impose specific obligations. A considerable margin of appreciation is left to States, but it is a margin that has its own limits. The expelling State is required to balance its own interests against those of the individual. It is, therefore, obliged to take account of the alien's acquired rights or legitimate expectations, and to arrive at a decision which bears a reasonable relationship to the facts." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 230 (citations omitted) (referring to *Ben Tillett's* case).

[632] This is the case of all the treaty provisions, reproduced in this paper, which deal with the grounds for expulsion.

[633] "While it is uncontroversial that it is for the expelling State to determine whether there is sufficient cause to remove from its territory any individual alien who is lawfully present there, it may now be taken to be established that the State's discretion in this respect is not unqualified." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 460 (referring to *Ben Tillett's* case).

[634] "Governments of expelled subjects and international commissions have freely assumed the right to pass upon the justification for an expulsion and the sufficiency of the evidence in support of the charges on which an order of expulsion is based, it being admitted in practice, if not in theory, that such an extreme measure as expulsion can be used only when it is shown that the individual's presence is detrimental to the welfare of the state." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New

sufficient to negate any presumption of arbitrariness should not be subject to further scrutiny (except in relation to specific treaty obligations), particularly when the ground relates to national security interests.[635]

3. Duty to provide the ground for an expulsion

309. There may be some question as to nature and extent of the duty of a State to provide the ground for the expulsion of an alien.[636] The duty of a State to provide the justification for such an expulsion may be traced to the general limitations on the expulsion of aliens, particularly the

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York, The Banks Law Publishing Co., 1915, pp. 56-57 (citations omitted). "The authority of certain of the older awards has been questioned, but it is thought that the legal principles stated in them can still be upheld. It appears that, when an international tribunal is presented with serious reasons for the expulsion of an alien, it will normally treat them as conclusive. However, where an unusual or unexpected use is made of the power of expulsion, such as the collective and apparently discriminatory expulsion of thousands of established aliens, which use is detrimental to the interests of the expellees and their receiving States, it is thought that the principle stated in *Boffolo's* case that an international tribunal may consider whether the reasons advanced for an expulsion are adequate is still applicable." Vishnu D. Sharma, and F. Wooldridge, note 579 above, pp. 407-408 (citations omitted).

[635] "If it does give reasons, any scrutiny of them, and the evidence supporting them, is (unless it is a question of establishing that specific conditions laid down by treaty have been met) probably to be limited to establishing that they are *prima facie* sufficient to negate any presumption of arbitrariness: particularly where interests of national security are concerned, a meticulous scrutiny of the reasons for a state's decision would be inappropriate." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 943-944 and n. 16 ("In the *Hockbaum* case, decided in 1934 by the Upper Silesian Arbitral Tribunal, it was held that when expulsion is based on grounds of public safety the Tribunal will not, as a rule, review the decision of the competent state authorities: *Decisions of the Tribunal,* vol. 5, No 1, p 20ff; AD, 7 (1933-34), No 134; Z6V, 5 (1935), pp 653-5. See also *Re Rizzo and Others (No 2),* ILR, 22 (1955), pp 500, 507; *Agee v. UK* (1976), *Decisions and Reports of the European Commission of Human Rights, 7,* p 164; *R v. Secretary of State for Home Affairs, ex parte Hosenball* [1977] 3 All ER 452.").

[636] "Owing to generally recognized freedom of governments in this field, it may even be doubtful whether a State is under an international duty to inform the aliens concerned or their countries of the reasons for expulsion. Such a duty, however, has been asserted by some publicists, and it has also been argued that an expulsion needs a special justification. State practice, on the other hand, does not seem strictly to confirm such a duty, and thus theory and practice show a certain contradiction in this field." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 110. "It is maintained that the expelled person has a right to know the reason for his expulsion, and that this reason should be communicated to the Government of the State to which he belongs." Amos S. Hershey, *The Essentials of International Public Law and Organization,* rev. ed., New York, The Macmillan Company, 1927, pp. 374-375.

prohibition of arbitrariness.[637] The failure to provide the reason or justification for the expulsion of an alien has been considered as evidence of arbitrariness.[638]

310. Thus, the duty of the expelling State to provide a ground for the expulsion of an alien seems to have arisen, at least initially, in response to a request from the State of nationality or in the context of an international proceeding initiated subsequent to the expulsion decision – rather than as a condition precedent.[639] It has sometimes been argued that a State does not have a duty to communicate the

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[637] "The United Kingdom recognizes that other states have a general right to deport United Kingdom citizens without stating reasons. On the other hand, the United Kingdom has stated that the right to deport 'should not be abused by proceeding arbitrarily' – a rather vague restriction on the right of deportation. It is often hard to prove that a deportation is arbitrary if no reasons are stated for it, but a statement of reasons given voluntarily by the deporting state may reveal that the deportation was arbitrary and therefore illegal, as was the case, for example, when the Asians were expelled from Uganda in 1972." Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed., London/New York, Routledge, 1997, pp. 261-262 (citing British Practice in International Law, 1964, p. 210 and 1966, p. 115).

[638] "While the failure of a state to advance any reason for the expulsion may not itself be a breach of any international legal obligation, the refusal to give reasons may lend support to a finding of arbitrariness in the expulsion." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 943-944 (citing *Boffolo Case*, Mixed Claims Commission Italy-Venezuela Constituted Under the Protocols of 13 February and 7 May 1903, *Venezuelan Arbitrations*, 1903, p. 696, and *Maal Case*, Mixed Claims Commission Netherlands-Venezuela Constituted Under the Protocol of 28 February 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, p. 730). "It was even suggested in the *Paquet Case* that a refusal to state reasons for expulsion would warrant the inference that the expelling State had exercised its power arbitrarily." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, pp. 461-462.

[639] "A State which has recourse to expulsion should be prepared to make known the reasons for its decision to the State of which the expelled alien is a national. The former does not appear, however, to be required to furnish evidence in justification of its conduct as a condition precedent to such action." Charles Cheney Hyde, *International Law; Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 232 (citations omitted).

reasons for its decision to expel an alien in the absence of the request for such information by the State of the expelled national[640] or an international tribunal.[641]

311. The duty of the expelling State to provide the ground for the expulsion of an alien was first recognized in relation to the State of nationality[642] or to an international

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[640] "As the order affects the citizens of another state, it has in practice become the rule that the government exercising the right of expulsion must on demand furnish evidence that the action was based on a legitimate fear that the public interests were in danger; for while in theory an absolute right and discretion are vested in the government, an arbitrary expulsion constitutes a basis for an international claim." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 51. "It is the sovereign right of a state to decide for itself whether the continued presence within its territory of a particular alien is so adverse to the national interests that the country needs to rid itself of him. At the same time, it cannot be denied that the home state of the expelled individual is, 'by its right of protection over citizens abroad,' justified in making diplomatic representations to the expelling state, and asking for the reasons of expulsion. Thus, though a state may exercise its right of expulsion according to discretion, it must not abuse this right by proceeding in an arbitrary manner." S.K. Agrawala, *International Law Indian Courts and Legislature*, Bombay, N.M. Tripathi Private Ltd., 1965, p. 186 (citation omitted). "The rule appears to be that the expelling State must, if required to do so by the State of nationality, advance a reason for the expulsion, which could reasonably and properly lead it to the conclusion that such an action is warranted in the public interest." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 461. "The state of nationality of an alien expelled may assert the right to inquire into the reasons for his expulsion, and the sufficiency of proof of the charges on which the expulsion is grounded." Shigeru Oda, "Legal Status of Aliens", *in* Sørensen, Max (dir.) *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, at p. 482.

[641] "The evidence furnished by the classical writers and by State practice is reinforced by decisions of arbitral tribunals. It must be acknowledged that the latter have been concerned with the expelling State's duty to advance reasons for the expulsion before an international tribunal rather than with a duty to state reasons to the authorities of the State of nationality. The arbitral decisions are, at least, consistent with the view that the expelling State is under a duty to advance reasons." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, pp. 461-462 (citing *Boffolo Case*). "However, it is doubtful to what extent the requirement of explicit reasons applies in cases other than those submitted to arbitration. In 1964, after an incident involving the expulsion of United Kingdom citizens from Tanzania, the view was expressed in Parliament that there was in fact no obligation to give reasons for deportation, although here they seem to have been apparent from the circumstances of the case. It is important that a requirement to give precise reasons should not be confused with an over-all requirement that expulsion should be based on 'reasonable cause'. This may appear to be only a matter of detail, but it gives substance to both the obligation not to proceed in an arbitrary manner and the right to judge reasons of 'ordre public' in the light of national criteria." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 232.

[642] "The need for the expelling state not to act arbitrarily, especially in the case of expulsion of an alien who has been residing in the expelling state for some length of time, and has established his means of livelihood there, justifies the home state of the expelled individual, by virtue of its right of protection over nationals abroad, in making diplomatic representations to the expelling state, and asking for the reasons for the expulsion." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 943-944 (citation omitted). "Hence Goodwin-Gill states that 'it is doubtful to what extent the requirement of explicit reasons applies in cases other than those submitted to arbitration'… Apart from specific obligations imposed by reason of the *compromis*, the submission of a dispute to arbitration does not in principle alter the obligations of

tribunal.[643] The expelling State would also appear to have a duty to provide the reason for the expulsion to the individual alien.[644] This notification would appear to be an essential element of the procedural requirements for the lawful expulsion of an alien discussed below.[645]

312. The duty of the expelling State to provide the ground for the expulsion of an alien has been addressed in treaty law, international jurisprudence and within the framework of international organizations.[646]

313. In terms of treaty law, the Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union provides, in Article 7, as follows:

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the States in respect of the question posed. Accordingly, an obligation to advance reasons to the arbitrator ought in principle to be matched by a corresponding obligation owed to the State of nationality when the latter seeks to resolve the difference by diplomatic means." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, pp. 461-462 (quoting Goodwin-Gill, Guy S., *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 232).

[643] "The country exercising the power of expulsion must, when occasion demands, state the reason of such expulsion before an international tribunal, and an inefficient reason or none being advanced, 'accept the consequences', said the arbitrator in a learned award in the *Boffolo* case. The same principle has been expressed in a number of other awards [*Oliva* case, *Paquet* case and the *Zerman* case], either directly or indirectly, in the form of a refusal to grant compensation when there had been a clear reason for expulsion, for instance when the alien had taken part in subversive activities [*San Pedro* case]." Hersch Lauterpacht (ed.), *The Function of Law in the International Community*, Oxford, Clarendon Press, 1933, p. 289 (citations omitted).

[644] "Nevertheless, the growth of international intercourse has tended to limit the exercise of the right of expulsion, and by municipal law and treaty many states have now limited their freedom of action… by agreeing to notify the individual or his legation and to state the grounds of expulsion." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1915, p. 50.

[645] *See* Part VIII.B.8(b).

[646] "To minimize the harsh and arbitrary use of the power, numerous treaties between states stipulate that the subjects of the contracting parties shall not be expelled except for reasons of weight … and that the reasons for the expulsion shall be communicated to his state or legation with the evidence. This last provision occurs especially in the treaties between European states and the countries of Latin America, where expulsion has been frequently resorted to. Even in the absence of treaty it has been held that the alien's national government has a right to know the grounds on which the expulsion is based and to have the assurance that the reasons are valid and sustained by evidence." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1915, p. 56. (Citations omitted.) "Nevertheless, a duty not to expel and a duty to give reasons for expulsion may arise from international treaties (e.g. United Nations Covenant on Civil and Political Rights, Art. 13, European Convention on Establishment of 1955, Art. 3)." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at pp. 110-111.

> "[…] notification of the expulsion order shall be addressed directly, prior to its execution, to the responsible authorities of the Contracting Party of which the person concerned is a national. The notification shall state the grounds for the expulsion."[647]

314. As regards arbitral awards, in the *Paquet Case*, the Umpire referred to the need for the expelling State to give the State of nationality of the alien expelled the reasons for the expulsion. The Umpire did not express this requirement in terms of an obligation arising from a specific rule of international law. However, he relied on the "general practice amongst governments" and drew, from the expelling State's refusal to provide explanations to the State of nationality of the alien concerned, the conclusion that the expulsion was arbitrary:

> "[…] on the other hand, the general practice amongst governments is to give explanations to the government of the person expelled if it asks them, and when such explanations are refused, as in the case under consideration, the expulsion can be considered as an arbitrary act of such a nature as to entail reparation […]".[648]

315. A similar conclusion was reached in the *Boffolo Case*. The Umpire, after having stressed that "[…] the Commission may inquire into the reasons and circumstances of the expulsion",[649] observed that the State must accept the consequences of not giving any reason, or giving an inefficient reason, to justify an expulsion, when so required by an international tribunal:

> "[…] The country exercising the power must, when occasion demands, state the reason of such expulsion before an international tribunal, and an inefficient reason or none being advanced, accept the consequences."[650]

316. The same approach was taken in the *Zerman v. Mexico Case*. The Commission found that if the expelling State had grounds for expelling the claimant, it was under the obligation of proving charges before the Commission:

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[647] Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union, Brussels, 19 September 1960, United Nations, *Treaty Series*, vol. 480, No. 5471, p. 424, Article 7.

[648] *Paquet Case (Expulsion)*, Mixed Claims Commission Belgium-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. IX, pp. 323-325, at p. 325 (Filtz, Umpire).

[649] *Boffolo Case*, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 528-538, at p. 534 (Ralston, Umpire).

[650] Ibid., p. 537, para. 3 (Ralston, Umpire). A different view was expressed by the Venezuelan Commissioner in the *Oliva Case*: "The Government of Venezuela considered the foreigner, Oliva, objectionable, and made use of the right of expulsion, recognized and established by the nations in general, and in the manner which the law of Venezuela prescribes. Italy makes frequent use of this right. The undersigned does not believe that Venezuela is under the necessity of explaining the reasons for expulsion." *Oliva Case*, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 600-609, at pp. 604-605.

> "The umpire is of opinion that, strictly speaking, the President of the Republic of Mexico had the right to expel a foreigner from its territory who might be considered dangerous, and that during war or disturbances it may be necessary to exercise this right even upon bear suspicion; but in the present instance there was no war, and reasons of safety could not be put forward as a ground for the expulsion of the claimant without charges preferred against him or trial; but if the Mexican Government had grounds for such expulsion, it was at least under the obligation of proving charges before the commission. Its mere assertion, however, or that of the United States consul in a dispatch to his government, that the claimant was employed by the imperialist authorities does not appear to the umpire to be sufficient proof that he was so employed or sufficient ground for his expulsion."[651]

317. With respect to international organizations, the duty to provide the ground for expulsion was addressed within the framework of the League of Nations. In 1924, the three legal advisers to the Rapporteur of the Council of the League of Nations on the lawfulness, under international law, of the decision of the High Commissioner of the League of Nations, dated 1 August, concerning the expulsion of Danzig citizens from Poland, submitted the following legal opinion:

> "It is a principle of international law that a State may expel an alien for the reason that it regards him as undesirable. The most that is demanded by international practice is that the State pronouncing the expulsion should, at the request of the State to which the person expelled belongs, inform it of the nature of the reasons connected with his personal activities for which the individual was expelled."[652]

318. This question has also been addressed within the framework of the Organization of American States. In this regard, the Inter-American Commission on Human Rights stressed the need for proper justification of an expulsion by rejecting "vague accusations" such as "foreign undesirable" or "having violated the laws of the country":

> "In this case, the vague accusation of 'foreign undesirable' was made against Father Carlos Stetter without stating why, and he was accused vaguely of 'having violated the laws of the country', without stipulating which laws."[653]

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[651] J. N. Zerman v. Mexico, Award of 20 November 1876, in John Bassett Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party, vol. IV, p. 3348.

[652] Resolution of the Council and Report by M. Quinones de Leon: Free City of Danzig: Expulsion of Danzig Nationals from Poland, 13 September 1924, League of Nations, *Official Journal*, vol. 5, p. 1551, p. 277.

[653] Inter-American Commission on Human Rights Resolution 30/81, Case 73/78 (Guatemala), 25 June 1981, *Annual Report of the Inter-American Commission on Human Rights 1980-1981*, OEA/Ser.L/V/II.54, doc. 9 rev. 1, 16 October 1981, Background: 1.

4. Sufficient basis for the ground

319. There would appear to be a requirement for a sufficient or reasonable basis for concluding that a valid ground exists rather than mere suspicion, at least with respect to expulsions in time of peace.[654] The lawfulness of the expulsion of aliens has been successfully challenged based on insufficient evidence of a valid ground.[655]

5. Validity of grounds

320. The question arises as to whether the validity of the ground for the expulsion of an alien by a State is governed by national law or international law.

321. As a practical matter, the competent national authority would most likely determine this question in the first instances on the basis of the relevant national law. The national laws of States may provide a partial or complete list of grounds for the expulsion of aliens or may simply require a valid ground for such action.[656] It has been suggested that all valid grounds for expulsion are merely a reflection of some aspect of the public interest of the State.[657]

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[654] "Moreover, in two early decisions the arbitrators held that an expelling State could not, in time of peace, advance a mere suspicion as a ground for expelling an alien [*Zerman's* case and *Lorenzo Oliva*]. In the event of the expulsions from South Africa in 1900, the Commission established by the British Government stated that mere assertions that a certain person was undesirable or was concerned in a plot are 'useless, without authenticated reasons and proofs'. In *Loubriel's Case* 'motives of internal order', 'reasons of gravity' and 'facts well known to the Government of Venezuela' were deemed to be too vague." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 462 (citations omitted). "Whereas expulsion on mere suspicion might be warranted in time of war or other disturbances, no such circumstances existed in this case and 'reasons of safety' could not be advanced as a sufficient ground. If the Mexican Government had had good reasons for the expulsion, then it was at least under an obligation of proving its charges before the Commission. Mere suspicion was disallowed again in the case of *Lorenzo Oliva* in 1903." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 231 (citation omitted).

[655] "States have not hesitated to protest where the alleged reasons constituted insufficient evidence that a just cause existed." Ibid., p. 232. The question of the burden of proof has been addressed in Part XI.B.

[656] "In many countries, the power of expulsion or deportation is regulated by statute which specifies the grounds on which it may be exercised ... These statutes usually apply the generally accepted principles of international human rights. Thus it is usually provided: that no person be expelled or reported from the territory of a State except on reasonable grounds ..." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 91 (paragraph indentation omitted). "While the grounds of exclusion are usually prescribed by statute, governments rarely attempt to enumerate the grounds of expulsion … An enumeration of specific grounds is, however, an exception to the rule, as states have not generally been willing thus to hamper their freedom of action." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1915, pp. 49-50. "It has been estimated that, in the law of the United States, the eighteen general classes of deportable aliens entail some 700 different grounds for removal." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 240 (citation omitted).

[657] "'Some writers have essayed to enumerate the legitimate causes of expulsion. The effort is useless. The reasons may be summed up and condensed in a single word: the public interest of the State': IV Moore *Digest*

322. International law would be relevant to a determination of the lawfulness of the ground for expulsion at least to the extent that it provides a relevant standard either with respect to certain aliens (e.g. refugees) or certain grounds (e.g. prohibition of racial discrimination). There are different views as to the feasibility of elaborating an exhaustive list of permissible grounds for the expulsion of aliens as a matter of international law.[658]

323. In 1892, the Institut de Droit international attempted to enumerate the valid grounds for the expulsion of aliens following an intense debate indicating two divergent views on the relationship between the rule and the exception.[659] According to one view, States possessed a general right of expulsion subject only to certain limitations. According to another view, the expulsion of aliens should be prohibited except in certain cases. Finally, the Institut de Droit international voted in favour of including an enumeration of the valid grounds for expulsion in the *Règles internationales sur l'admission et l'expulsion des étrangers*. Article 28 includes the following grounds for the expulsion of aliens: violation of immigration law; threat to public health; dependence on public assistance; conviction for serious offences; attacking, in the press or by other means, a foreign State or its institutions; attacking or insulting the host State in the foreign press; and imperiling the security of the State during war or when war is imminent.[660]

68." *Per* Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 478, n. 15. "The legitimate causes of expulsion it is impracticable to enumerate. A general justification for the action may be summed up in the words 'the public interests of the state.'... The grounds of expulsion are often identical with those justifying exclusion, namely, undesirablity of a moral, social or economic kind." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1915, p. 51.

[658] While this survey tends to confirm the impossibility of devising an exclusive list of the grounds on which States may expel aliens, it reveals sufficient congruence of State practice to support the view that the expulsion of an alien without cause amounts to a breach of international practice such as to warrant a remonstrance from the State of nationality." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 468 (citations omitted).

[659] See *Institut de Droit international*, note 608 above, pp. 184-226.

[660] *Règles internationales*, note 56 above, article 28 [French original]:

"The following persons may be expelled:

"1. Aliens who have entered into the territory fraudulently, in violation of regulations on the admission of aliens; however, if there are no other grounds for expulsion, once they have spent six months in the country they may no longer be expelled;

"2. Aliens who have established their domicile or residence within the territory, in violation of a strict prohibition;

"3. Aliens who, at the time they crossed the border, suffered from an illness that posed a threat to public health;

"4. Aliens in a situation of begging or vagrancy, or dependent on public assistance;

"5. Aliens convicted by the courts of the country for serious offences;

324. In the absence of a specific rule of international law, a State may enjoy a fairly broad measure of discretion in determining whether there are valid grounds for the expulsion of an alien based on its national interests. In this regard, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Baroness Elles, expressed the view that, contrary to the situation of specific categories of aliens such as refugees, who may only be expelled for grounds related to national security or public order, such a restriction does not apply to aliens in general.

> "The grounds on which refugees may be expelled are restricted to national security or public order. For aliens generally, there is no such restriction on the grounds for expulsion, though it has been suggested that the specific safeguards which were included for the protection of refugees should be extended to all aliens who were liable to be expelled."[661]

6. Possible grounds for expulsion

325. The possible grounds for the expulsion of aliens are addressed in greater detail in national law than international law. National legislation and jurisprudence differ with respect to the grounds for expulsion.[662] States may adopt a more liberal or a more conservative policy with respect to the presence of aliens in their territory. In particular, States may adopt a more restrictive or a more expansive approach to the permissible grounds for expulsion. The fact that national laws differ in this regard does not necessarily mean that one of the laws is invalid.[663] The grounds for expulsion

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"6. Aliens who have been convicted or are subject to prosecution abroad for serious offences which, according to the legislation of the country or under extradition agreements entered into by the State with other States, could give rise to their extradition;

"7. Aliens who are guilty of incitement to commit serious offences against public safety even though such incitement is not in itself punishable under the territory's legislation and even though such offences were intended to be carried out only abroad;

"8. Aliens who, in the territory of the State, are guilty or are strongly suspected of attacking, either in the press or by some other means, a foreign State or sovereign or the institutions of a foreign State, provided that such acts, if committed abroad by nationals and directed against the State itself, are punishable under the law of the expelling State;

"9. Aliens who, during their stay in the territory of the State, are guilty of attacks or insults published in the foreign press against the State, the nation or the sovereign;

"10. Aliens who, in times of war or when war is imminent, imperil the security of the State by their conduct."

[661] International provisions protecting the human rights of non-citizens, study prepared by the Baroness Elles, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/392/Rev.1, 1980, para. 287.

[662] "States differ with respect to the causes that are regarded as sufficient to justify the expulsion of aliens. No commonly accepted tests of such causes are available. Thus in practice, an aggrieved State enjoys a wide latitude." Charles Cheney Hyde, *International Law; Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 234.

[663] "The grounds for expulsion of an alien may be determined by each state by its own criteria. Yet the right of expulsion must not be abused." Shigeru Oda, "Legal Status of Aliens", *in* Sørensen, Max (dir.) *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, at p. 482.

provided for in national legislation may be invalid if they conflict with international law. The rules of national law as well as international law may be more clearly established with respect to the validity of certain grounds for the expulsion of aliens as compared to others.[664] The validity of the possible grounds for the expulsion of aliens are therefore considered on an individual basis.

(a) Illegal entry

326. Entry in violation of the immigration laws of the territorial State has been recognized as a valid ground for the expulsion of an alien in State practice and literature.[665]

327. The Special Rapporteur on the rights of non-citizens, David Weissbrodt, while stressing that illegal aliens should not be treated as criminals, recognized in general terms the right of a State to require their departure from its territory:

> "There is significant scope for States to enforce their immigration policies and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may not be exercised arbitrarily. A State might require, under its laws, the departure of persons who remain in its territory longer than the time allowed by limited-duration permits. Immigrants and asylum-seekers, even those who are in a country illegally and whose claims are not considered valid by the authorities, should not be treated as criminals."[666]

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[664] "As regards expulsion in time of peace, on the other hand, the opinions and the practice of states differ substantially as to what may constitute a just cause for expulsion. While some causes (such as engaging in espionage activities) are universally accepted as justifying expulsion, other causes are more debatable: yet no state which expels an alien will admit not having had a just cause for doing so. The matter is scarcely susceptible of answer once and for all by the establishment of a body of rules." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 941 and n. 5 ("The Institute of International Law at its meeting at Geneva in 1892 adopted a body of 41 articles concerning the admission and expulsion of aliens, and in Art 28 thereof enumerated nine just causes for expulsion in time of peace … Many of these causes, such as conviction for crimes, for instance, are certainly just causes, but others are doubtful.") (citation omitted).

[665] "State practice accepts that expulsion is justified: *(a)* for entry in breach of law …" Guy S. Goodwin-Gill, International Law and the Movement of Persons between States, Oxford, Clarendon Press, 1978, p. 262. "An unlawful entry can result in the expulsion of the foreigner on the ground that the entry was not justified" Karl Doehring, "Aliens, Admission", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 107-109, at p. 108. "Very commonly, an alien's deportation may be ordered … for breach of immigration law." Richard Plender, International Migration Law, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, pp. 467-468 (citation omitted). "The alien can be expelled or deported at any time if it is discovered later that he or she entered the country illegally, unless the alien can benefit from a local statute of limitations, an amnesty or a pardon." Louis B. Sohn and T. Buergenthal (eds.), The Movement of Persons across Borders, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 90. *See* also *Règles internationales,* note 56 above, article 28, paras. 1 and 2.

[666] The rights of non-citizens, note 460 above, para. 29 (citations omitted).

328. The African Commission on Human and Peoples' Rights has recognized illegal presence as a valid ground for expulsion.

> "[…] The fact that Banda was not a Zambian by itself, does not justify his deportation. *It must be proved that his presence in Zambia was in violation of the laws.* To the extent that neither Banda nor Chinula were supplied with reasons for the action taken against them means that the right to receive information was denied to them (Article 9(1) [of the African Charter on Human and Peoples' Rights][667])."[668] [Emphasis added.]

> "The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is however of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter and international law."[669]

329. While the national laws of some States provide that aliens who have entered the territory illegally may be subject to exclusion rather than expulsion in certain cases,[670] the national laws of other States recognize illegal entry as a valid ground for the expulsion of an alien as noted by some authors.[671] The ground of illegal entry can be applied when expelling someone who is staying or residing in the State without having first received entry authorization, or who is otherwise inadmissible.[672] The alien's unintentionally illegal entry, or the illegal entrant's accidental admission

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[667] This provision states: "Every individual shall have the right to receive information."

[668] African Commission on Human and Peoples' Rights, Communication No. 212/98, *Amnesty International v. Zambia, Twelfth Annual Activity Report*, 1998-1999, para. 33.

[669] African Commission on Human and Peoples' Rights, note 368 above, para. 20.

[670] See *Seyoum Faisa Joseph v. U.S. Immigration & Naturalization Service*, U.S Court of Appeals, 4th circuit, 20 May 1993, No. 92-1641 ("Mr. Joseph arrived in this country as a stowaway and therefore is classified under the INA as 'excludable.'")

[671] "In most statutes governing immigration, the right of expulsion or deportation is a sanction for the provisions relating to exclusion, and numerous expulsions are founded on the charge of presence in the territory in violation of its laws or the regulations concerning the admission of foreigners." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, pp. 51-52. "The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the following heads: 1. Entry in breach of immigration law…" Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 255.

[672] *See*, e.g., China, 2003 Provisions, article 182; Nigeria, 1963 Act, articles 19, 46; Paraguay, 1996 Law, article 38; and United States, INA, section 237(a)(1)(A), (H).

to the State, may or may not statutorily lead to the State's legitimation of the entry.[673] Stowaways, whether[674] or not[675] defined as a special category of aliens in the relevant law, may be subject to expulsion either because of their status[676] or on the same grounds as other aliens.

330. Among the specific grounds for expulsion relating to illegal entry are the situations in which an alien (1) enters or attempts to enter when the borders have been closed temporarily to aliens[677] or to a particular group of aliens,[678] or at a place or time not designated as an authorized crossing point;[679] (2) evades, obstructs or attempts to evade or obstruct immigration controls or authorities,[680] including with respect to an entry inspection[681] or a required fee;[682] (3) lacks required documents,[683] or presents

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[673] In Nigeria, an illegal entry permitted through an "oversight" by the relevant authorities can still be illegal and grounds for expulsion (Nigeria, 1963 Act, article 19(2)). The United States permits the removal of a "preference immigrant" visa if the alien is found not to be such (United States, INA, section 206). In Brazil, an "irregular" entry may be deemed "unintentional," with the result that the alien has a shorter period in which to vacate the territory than would be the case if the alien had committed certain infractions (Brazil, 1981 Decree, article 98).

[674] United States, INA, section 101(a)(49).

[675] Kenya, 1967 Act, article 8; and Nigeria, 1963 Act, article 28(1), 1963 Regulations (L.N. 93), articles 1(2), 8(2).

[676] Kenya, 1967 Act, article 8; and United States, INA, sections 212(a)(6)(D), 235(a)(2).

[677] Kenya, 1973 Act, article 3(1)(a); and Sweden, 1989 Act, section 12.4.

[678] Australia, 1958 Act, articles 177, 189-90, 198, 230, 249(1)(a), 251; and Nigeria, 1963 Act, article 25.

[679] Argentina, 2004 Act, articles 29, 37; Australia, 1958 Act, articles 189-90; Chile, 1975 Decree, articles 3, 69; Czech Republic, 1999 Act, section 9(1); Guatemala, 1986 Decree-Law, article 74; Japan, 1951 Order, article 2; Nigeria, 1963 Act, article 16; Paraguay, 1996 Law, article 79(3); Tunisia, 1968 Law, article 4; and United States, INA, sections 212(a)(6)(A), 271(b), 275(a)(1), (b).

[680] Argentina, 2004 Act, articles 29, 37; Australia, 1958 Act, articles 190, 230-31, 233; Brazil, 1980 Law, article 124(I); Chile, 1975 Decree, article 69; Guatemala, 1986 Decree-Law, article 74; Italy, 1998 Decree-Law No. 286, article 13(2)(a), 1998 Law No. 40, article 11(2); Japan, 1951 Order, article 24(2); Nigeria, 1963 Act, article 46; Paraguay, 1996 Law, articles 79(3), 81(1); Portugal, 1998 Decree-Law, article 99; United States, INA, section 275(a)(2). Persons may be characterized as stowaways on the basis of such acts (Australia, 1958 Act, articles 230-31, 233). In order to identify and exclude such stowaways, a State may require landing ships to submit their manifests to the relevant authority (Australia, 1958 Act, article 231; and Nigeria, 1963 Regulations (L.N. 93), article 8(2)), or permit a search of the ship by the relevant authority (Republic of Korea, 1992 Act, articles 69-71).

[681] Republic of Korea, 1992 Act, article 46(3); Nigeria, 1963 Act, article 16; United Kingdom, 1971 Act, section 8(1)(c); and United States, INA, section 275(a)(2).

[682] Poland, 2003 Act No. 1775, article 21(1)(1).

[683] The alien may in this respect fail to hold, present or be eligible for any or all necessary documentation, including a passport or visa, or to provide any or all necessary information (Australia, 1958 Act, articles 177, 190, 229, 233A; Belarus, 1999 Council Decision, article 2, 1993 Law, article 20(4); Brazil, 1980 Law, articles 124(VI), 127; Chile, 1975 Decree, articles 15(7), 65(1); Czech Republic, 1999 Act, section 9(1); France, Code, article L511-1(1); Italy, 1998 Decree-Law No. 286, article 10, 1998 Law No. 40, article 5; Japan, 1951 Order,

ones which are either damaged or unusable;[684] (4) presents forged or misleading documents or other information;[685] (5) fails, for whatever reason, after crossing the border to obtain the necessary entry documents, correct a violation or regularize the alien's status;[686] (6) violates the terms of the alien's transitory presence in the State's territory;[687] or (7) is considered to be undesirable[688] or otherwise

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article 24(1)-(2); Kenya, 1967 Act, articles 4(2), 7; Nigeria, 1963 Act, articles 18, 46(3)(b); Panama, 1960 Decree-Law, articles 58, 60; Paraguay, 1996 Law, article 79(1); Poland, 2003 Act No. 1775, article 21(1); Tunisia, 1968 Law, article 5; and United States, INA, sections 212(a)(7), 275(a)). The alien's entry may also be illegal due to a visa or other necessary document that has been cancelled or is susceptible to cancellation prior to or upon the entry, even if the entry occurs during an otherwise legal stay (Australia, 1958 Act, articles 229, 232, 252; Bosnia and Herzegovina, 2003 Law, article 47(1)(d), (3); Chile, 1975 Decree, article 65; Czech Republic, 1999 Act, section 9(1); Portugal, 1998 Decree-Law, article 13(4); and Sweden, 1989 Act, sections 2.9-10), or if the alien's visa is of insufficient duration to cover the whole of the alien's expected stay (Czech Republic, 1999 Act, section 9(2)-(3)).

[684] Such documents can be illegible, damaged or otherwise physically incomplete, or ones to which the State cannot add necessary permits or marks (Bulgaria, 1998 Law, article 3; Czech Republic, 1999 Act, section 9(1)-(3)).

[685] Argentina, 2004 Act, articles 29(a), 35; Australia, 1958 Act, articles 233A, 234, 236; Belarus, 1993 Law, article 20(4); Brazil, 1980 Law, articles 64, 124(XIII), 127; Bulgaria, 1998 Law, article 3; Canada, 2001 Act, article 40(1)(a)-(b); Chile, 1975 Decree, articles 63(3), 65(1)-(2), 68; China, 1986 Law, articles 29-30; Czech Republic, 1999 Act, section 9(1); Guatemala, 1999 Regulation, article 97, 1986 Decree-Law, article 73; Italy, 1998 Decree-Law No. 286, articles 4, 8, 10; Japan, 1951 Order, articles 22-4(1)-(4), 24(3); Kenya, 1967 Act, article 7; Republic of Korea, 1992 Act, articles 46(1-2), 89(1)(2); Nigeria, 1963 Act, article 46(3)(a); Panama, 1960 Decree-Law, article 61; Paraguay, 1996 Law, articles 38, 79(1), 81(2), 108(1), 110-11; Poland, 2003 Act No. 1775, article 21(4); Portugal, 1998 Decree-Law, article 13(4); Russian Federation, 2002 Law No. 115-FZ, articles 7(4), 9(4), 18(9)(4), 1996 Law, article 26(5); Sweden, 1989 Act, sections 2.9-10, 7.18; United Kingdom, 1971 Act, sections 24A(1)(a), 33(1) (as amended by the Asylum and Immigration Act 1996); and United States, INA, sections 212(a)(6)(C), 275(a)(3). An alien may be expressly defined on this basis as a stowaway (Japan, 1951 Order, article 74).

[686] Australia, 1958 Act, articles 181(2)-(3), 182, 198; Ecuador, 2004 Law, chapter 7 (Transitional Provisions); Italy, 1998 Decree-Law No. 286, article 13(2)(b); Russian Federation, 1996 Law, article 26(1); and United States, INA, section 206.

[687] Belarus, 1998 Law, article 26; Brazil, 1980 Law, articles 56(1), 124(IX), 127; Chile, 1975 Decree, article 85; China, 1986 Law, articles 29-30; Iran, 1931 Act, article 11(b); Japan, 1951 Order, articles 16(6)-(7), 24(4)-(6), (6A); Republic of Korea, 1992 Act, article 89(1); Nigeria, 1963 Act, articles 11, 27; Panama, 1960 Decree-Law, article 61; Russian Federation, 1996 Law, article 25.10, Administrative Code, Chapter 18, article 18.8; Sweden, 1989 Act, section 9.3; and United States, INA, sections 237(a), 252. An alien may be defined on this basis as a stowaway or akin thereto (Nigeria, 1963 Act, article 28).

[688] Australia, 1958 Act, articles 5, 16; Belarus, 1993 Law, article 20(6); Brazil, 1980 Law, article 61; Czech Republic, 1999 Act, section 9(1); Kenya, 1967 Act, article 3(1)(f); Paraguay, 1996 Law, article 79(5); Poland, 2003 Act No. 1775, article 21(1)(2); Russian Federation, 1996 Law, article 25.10; and Switzerland, 1931 Federal Law, article 13(1). Nigeria permits its relevant Minister to refuse entry to any alien or class of alien if the Minister deems such a refusal to be for the public good (Nigeria, 1963 Act, article 18(2)).

unsuitable for entry into the State's territory based either on the alien's lifestyle or perceived personal qualities,[689] or on the alien's past breach of the State's conditions for entry or stay.[690]

331. The expulsion of an alien on this ground may be affected by: (1) the alien's route of arrival;[691] (2) international considerations such as a special arrangement between the alien's State and the State entered,[692] any relevant international agreement or convention,[693] or the request or requirement of an international body;[694] (3) intertemporal considerations such as the timing of the alien's entry relative to the relevant legislation's entry into force,[695] or the relevant law in force at the time of the alien's entry;[696] or (4) the amount of time that has passed since the alien's entry into the State's territory.[697]

332. The relevant national legislation may expressly permit the application of criminal penalties in addition to expulsion when grounds relating to illegal entry exist.[698] It may likewise specify that the expulsion shall take place after the completion of the sentence imposed.[699] A State may apply to the alien's dependents the alien's grounds for expulsion relating to illegal entry.[700]

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[689] The alien may in this respect be a practicing polygamist (France, Code, article L521-2(1); United States, INA, section 212(a)(10)(A)), or otherwise deemed ineligible for settlement or citizenship (Argentina, 2004 Act, article 29(j); and United States, INA, section 212(a)(8)).

[690] The alien may in this respect have failed to comply during a previous stay with either the expelling State's exit requirements (Russian Federation, 1996 Law, article 26(5)-(6)), or more generally with the laws or obligations placed upon aliens (Belarus, 1993 Law, article 20(3); and Czech Republic, 1999 Act, section 9(1)).

[691] Nigeria, 1963 Act, articles 16, 25.

[692] Czech Republic, 1999 Act, section 9; and Italy, 1998 Decree-Law No. 286, article 4. This arrangement can, for example, be the Schengen Agreement (France, Code, article L621-2; and Portugal, 1998 Decree-Law, articles 13(4), 25(1), 120, 126(3)), or one under the Commonwealth (Nigeria, 1963 Act, articles 10(1), 18(4)), the European Union (Italy, 1998 Decree-Law No. 286, article 5(12), 1998 Law No. 40, article 5(7)) or the International Organization for Migration (Portugal, 1998 Decree-Law, article 126A(1)).

[693] Czech Republic, 1999 Act, section 9(1)-(3); Italy, 1998 Decree-Law No. 286, article 5(11), 1998 Law No. 40, article 5(6); Spain, 2000 Law, article 26(1); and Sweden, 1989 Act, section 4.2(5).

[694] United Kingdom, 1971 Act, section 8B(5) (as amended by the Immigration and Asylum Act 1999).

[695] Australia, 1958 Act, article 251(6)(c); Ecuador, 2004 Law, chapter 7 (Transitional Provisions); France, Code, article L541-4; and Italy, 1998 Law No. 40, article 11(15).

[696] Australia, 1958 Act, article 14(2); Kenya, 1967 Act, article 3(1)(i); and United States, INA, section 237(a)(1)(A).

[697] Sweden, 1989 Act, section 4.2.

[698] Chile, 1975 Decree, articles 68-69; China, 1986 Law, article 29; Paraguay, 1996 Law, article 108(1); Portugal, 1998 Decree-Law, article 99(2); and United Kingdom, 1971 Act, section 24(1)(a).

[699] Chile, 1975 Decree, article 69; and Guatemala, 1986 Decree-Law, article 74.

[700] Canada, 2001 Act, article 42(a)-(b).

333. National practice in some jurisdictions, as exemplified by the rulings of national courts and tribunals, also supports the validity of expulsion on the ground of illegal entry or presence.[701] However, where an individual has maintained a residence in the territorial State for an extended period of time, some national courts have ruled that mere illegal presence is not sufficient to support a decision of expulsion.[702]

(b) Breach of conditions for admission

334. An alien may be lawfully admitted to the territory of a State in accordance with its national immigration law subject to certain conditions relating to the admission or the continuing presence of the alien in the State. Such a legal alien may acquire the status of an illegal alien by violating these conditions. Breach of the conditions for the admission or continuing presence of an alien has been recognized as a valid ground for expulsion in State practice.[703]

335. The national laws of a number of States provide for the expulsion of aliens who have violated conditions for admission, such as those relating to the duration of their stay, the purpose of their stay and the permissible activities during their stay in the territory of the State.[704] A breach of the conditions for admission as a ground for expulsion may be broadly defined as illegal residence or presence,[705] a lack of grounds to justify the alien's stay,[706] the alien's undesirability,[707] a violation of any part of the

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[701] See, e.g., *United States ex rel. Tom Man v. Murff, District Director, INS*, Court of Appeals for the Second Circuit, 264 F.2d 926, 3 March 1959; *Khan v. Principle Immigration Officer*, Supreme Court of South Africa, Appellate Division, 10 December 1951.

[702] See, e.g., *In re Rojas et al.*, Supreme Court of Costa Rica, 26 July 1938; *Homeless Alien (Germany) Case*, Federal Republic of Germany, Federal Administrative Supreme Court, 30 September 1958, *International Law Reports*, vol. 26, 1958-II, E. Lauterprecht (ed.), pp. 393-395; *Re* Sosa, Supreme Court of Argentina, 23 March 1956; *Re* Leiva, Cámara Nacional de Apelaciones de Resistencia, Argentina, 20 December 1957.

[703] "The power of expulsion or deportation may be exercised if an alien's conduct or activities after being admitted into the state violate certain basic rules. Such conduct or activities include: 1. Residence or stay in the territory in violation of the conditions of entry…" Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 90-91. "State practice accepts that expulsion is justified… (b) for breach of the conditions of admission…" Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 262.

[704] "The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the following heads … 2. Breach of the conditions of entry; for example, working without a work permit." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 255. *See* also Part VII.A.6(i).

[705] China, 1986 Law, articles 27, 29-30, 1986 Rules, article 42; Croatia, 2003 Law, article 56; Kenya, 1967 Act, article 4(2); Lithuania, 2004 Law, article 126(1)(2); and Portugal, 1998 Decree-Law, article 99(1)(a).

[706] Austria, 2005 Act, article 3.54(1)(2); Bulgaria, 1998 Law, article 61(1)(4); and Spain, 2000 Law, article 28(3)(c).

[707] Australia, 1958 Act, articles 5, 16; and Russian Federation, 1996 Law, article 25.10.

relevant law,[708] or the violation of any condition of stay or residence.[709] More specific instances include the alien's failure to depart after the expiry of the permit or authorized period of stay,[710] defects in the permit,[711] the permit's revocation or refusal when protected status is not at stake,[712] the alien's failure otherwise to seek, obtain, hold or be eligible for a required permit,[713] impediments to the alien settling in the State;[714] the insufficiency of the alien's marriage to establish a right to stay,[715] or the presentation of forged or otherwise misleading documents or information for any purpose of stay not involving marriage.[716]

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[708] Argentina, 2004 Act, articles 29(k), 62(a); Belarus, 1993 Law, articles 24, 25(3)-(4); Bosnia and Herzegovina, 2003 Law, articles 27(1)(a), 47(1)(a); Canada, 2001 Act, article 41(a); Chile, 1975 Decree, articles 64(5)-(6), 66; Greece, 2001 Law, article 44(1)(b); Iran, 1931 Act, article 11(a); Kenya, 1967 Act, article 3(1)(j); Republic of Korea, 1992 Act, article 89(1)(5); Nigeria, 1963 Act, article 46(1)(b); Norway, 1988 Act, section 29(a); Paraguay, 1996 Law, articles 34(6), 37; Russian Federation, 2002 Law No. 115-FZ, articles 7(7), 9(7), 18(9)(7), 1996 Law, article 26(4); Spain, 2000 Law, article 53(e); Switzerland, 1931 Federal Law, article 13(1); and United States, INA, section 237(a)(1)(B). Paraguay also permits expulsion on the basis of special legislation (Paraguay, 1996 Law, article 81(6)).

[709] Argentina, 2004 Act, article 62(d); Brazil, 1980 Law, articles 124(XVI), 127; Bulgaria, 1998 Law, article 61(1)(4); Chile, 1975 Decree, articles 64(8), 66; Republic of Korea, 1992 Act, articles 46(1)(7)-(8), 68(1)(3), 89(1)(3); and Switzerland, 1931 Federal Law, article 13(1).

[710] Bosnia and Herzegovina, 2003 Law, article 57(1)(a); Brazil, 1980 Law, articles 124(II), 127; Chile, 1975 Decree, article 71; Finland, 2004 Act, section 143(3); France, Code, articles L511-1(2), L621-1; Guatemala, 1986 Decree-Law, article 76; Italy, 1998 Decree-Law No. 286, article 13(2)(e); Japan, 1951 Order, article 24(2)-3, (4)(b), (7); Madagascar, 1994 Decree, article 18, 1962 Law, article 12; Nigeria, 1963 Act, article 19(1), (4); Paraguay, 1996 Law, article 81(3); Russian Federation, 1996 Law, article 25.10, Administrative Code, Chapter 18, article 18.8; Spain, 2000 Law, articles 53(a), 57(1); Sweden, 1989 Act, section 4.3; and United States, INA, section 212(a)(9)(B)-(C).

[711] This can involve: (1) the expiration of circumstances or reasons which justified the prior decision to grant the permit (Argentina, 2004 Act, article 62(d); Australia, 1958 Act, articles 198(1A), 198B; Belarus, 1993 Law, article 24; Bosnia and Herzegovina, 2003 Law, articles 27(1)(e), 47(1)(e); Italy, 2005 Law, article 2; Republic of Korea, 1992 Act, article 89(1)(4); Russian Federation, 2002 Law No. 115-FZ, article 2; and Sweden, 1989 Act, section 8.16); or (2) the discovery of grounds which, had they been earlier known, would have precluded the granting of the permit (Austria, 2005 Act, article 3.54(1)(1)).

[712] Belarus, 1999 Council Decision, article 2, 1998 Law, article 28; Bosnia and Herzegovina, 2003 Law, articles 47(1)(h), 57(1)(b); Brazil, 1980 Law, articles 124(X), 127; China, 1992 Provisions, article I(iii); Finland, 2004 Act, section 168(1); France, Code, article L511-1(3), (6); Italy, 1998 Decree-Law No. 286, articles 5(10)-(11), 8, 13(2)(b), 1998 Law No. 40, articles 5(5)-(6), 11(2)(b); Japan, 1951 Order, article 24(2)-2; Republic of Korea, 1992 Act, article 68(1)(3); Paraguay, 1996 Law, article 81(4); Russian Federation, 2002 Law No. 115-FZ, articles 2, 31(1)-(2); Sweden, 1989 Act, section 4.3; Switzerland, 1931 Federal Law, article 12(3); and United States, INA, section 237(a)(1)(B).

[713] Chile, 1975 Decree, articles 31, 72; Croatia, 2003 Law, article 52; Finland, 2004 Act, sections 149(1)(1), 168(2); Italy, 1998 Decree-Law No. 286, articles 13(2)(b), 14(5*ter*)-(5*quinques*), 1998 Law No. 40, articles 5(7), 11(2)(b); Nigeria, 1963 Act, article 10(5); Panama, 1960 Decree-Law, article 58; Poland, 2003 Act No. 1775, article 88(1)(1); Russian Federation, 1996 Law, articles 25.10, 27(4), Administrative Code, Chapter 18, article 18.8; Spain, 2000 Law, articles 53(a), (g), 57(1); and United States, INA, section 206, 246. A State may, however, impose sanctions not expressly including expulsion for such infractions (Paraguay, 1996 Law, article 112(1); Russian Federation, Administrative Code, Chapter 18, article 18.8; and Spain, 2000 Law, articles 53, 57).

[714] Argentina, 2004 Act, article 29(j).

336. Grounds relating to the breach of conditions for admission may also exist when the alien fails to comply with integration or assimilation requirements or expectations,[717] a restriction on residence or place of stay,[718] or an obligation or prohibition placed either on all aliens or on the alien individually or as a member of a class,[719] such as one to register or notify authorities when so required, as when relevant documents are lost or when the alien changes residence, domicile or nationality,[720] to present proof of identification or authorization for presence in the State's territory when required to do so,[721] to refrain from travel to a forbidden area,[722] not to take up residence or

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[715] This can involve: (1) the invalidity, fraudulence or other defect of the marriage upon which the grant of the permit was conditioned (Belarus, 1998 Law, article 15; Hungary, 2001 Act, article 32(2)(h); Russian Federation, 2002 Law No. 115-FZ, articles 7(12), 9(12); and United States, INA, sections 216(b), 237(a)(1)(G), 275(c)); or (2) the general inability of a marriage to affect the alien's status (Madagascar, 1994 Decree, article 18).

[716] Argentina, 2004 Act, articles 29(a), 62(a); Belarus, 1998 Law, articles 14-15; Bosnia and Herzegovina, 2003 Law, articles 27(1)(f), 47(1)(f); Brazil, 1980 Law, articles 64(a), 124(XIII), 127; Chile, 1975 Decree, articles 64(2), 66; China, 1986 Law, articles 29-30, 1986 Rules, article 47; Nigeria, 1963 Act, article 46(3)(a), (c); Panama, 1960 Decree-Law, article 61; Paraguay, 1996 Law, articles 81(2), 108(1), 110-11; Russian Federation, 2002 Law No. 115-FZ, articles 7(4), 9(4), 18(9)(4); Spain, 2000 Law, articles 53(c), 57(1); Sweden, 1989 Act, sections 2.9-10; Switzerland, 1931 Federal Law, article 9(2)(a), (4)(a); United Kingdom, 1971 Act, section 24A(1)(a); and United States, INA, sections 101(a)(50)(f)(6); 212(a)(6)(C), 237(a)(3), 246(a)-(b), 266(c).

[717] Austria, 2005 Act, article 3.54(3)-(4); Japan, 1951 Order, article 22-4(5); and Switzerland, 1949 Regulation, article 16(2), 1931 Federal Law, article 10(1)(b).

[718] Republic of Korea, 1992 Act, article 46(1)(8); Paraguay, 1996 Law, article 34(2); and Switzerland, 1931 Federal Law, article 13e. Sanctions not expressly including expulsion may, however, be imposed for such infractions (France, Code, article L624-4; and Hungary, 2001 Act, article 46(1)(d)).

[719] Brazil, 1981 Decree article 104, 1980 Law, articles 64(d), 70; Chile, 1975 Decree, articles 63(4), 64(5)-(6), 65(2), 66; Honduras, 2003 Act, article 89(2); Nigeria, 1963 Act, articles 11(3), 19(4), 24(2), 27(3); Paraguay, 1996 Law, article 34(1)-(2); Russian Federation, Administrative Code, Chapter 18, article 18.8; and United States, INA, sections 212(a)(6)(G), 237(a)(1)(C).

[720] Brazil, 1980 Law, articles 124(III), (IV), 127; Chile, 1975 Decree, article 72; Republic of Korea, 1992 Act, article 46(1)(7), (10); Russian Federation, 1996 Law, article 25.10, Administrative Code, Chapter 18, article 18.8; Spain, 2000 Law, articles 53, 57; and United States, INA, sections 237(a)(3)(A)-(B), 266(c).

[721] China, 1986 Rules, article 43; and Nigeria, 1963 Act, article 46(3)(b).

[722] China, 1986 Law, articles 29-30, 1986 Rules, article 46; and Switzerland, 1931 Federal Law, article 13e.

obtain permission to reside outside the State,[723] or not to depart the State for longer than a certain period[724] or without authorization.[725]

337. The expulsion of an alien on this ground may be affected by a special arrangement between the alien's State and the State in which the alien is staying,[726] or any relevant international agreement or convention.[727] The relevant legislation may expressly permit the application of criminal penalties in addition to expulsion when grounds exist under this heading.[728] It may likewise specify that the expulsion shall take place after the completion of the sentence imposed.[729]

338. The national courts of several States have upheld a breach of conditions for admission as a valid ground for the expulsion of aliens.[730]

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[723] Belarus, 1998 Law, article 15; Bosnia and Herzegovina, 2003 Law, article 48(b); Russian Federation, 2002 Law No. 115-FZ, articles 7(10), 9(10); and Sweden, 1989 Act, section 2.12.

[724] Argentina, 2004 Act, article 62(c); Bosnia and Herzegovina, 2003 Law, article 48(a); Chile, 1975 Decree, article 43; Paraguay, 1996 Law, article 34(5); and Russian Federation, 2002 Law No. 115-FZ, articles 7(11), 9(11).

[725] Brazil, 1980 Law, articles 124(XIII), 127; and Republic of Korea, 1992 Act, article 46(1)(9); *compare* Spain, 2000 Law, articles 53(g), 57(1), which classify unauthorized departures as serious infractions which may be fined, but not as grounds for expulsion.

[726] This arrangement can, for example, be one established under the European Union (Finland, 2004 Act, section 168(1)-(2); France, Code, article L621-2; and Italy, 1998 Law No. 40, article 5(12), 1996 Decree-Law, article 7(3)), or the Commonwealth (Nigeria, 1963 Act, article 10(1)).

[727] China, 1986 Law, article 29; Italy, 1998 Decree-Law No. 286, article 5(11); and Portugal, 1998 Decree-Law, article 99(1)-(2).

[728] Chile, 1975 Decree, articles 63(3), 65(2)-(3); China, 1986 Rules, article 47; France, Code, articles L621-1, L621-2; Italy, 2005 Law, articles 10(4), 13(1), 1998 Decree-Law No. 286, article 14(*5ter*)-(*5quinques*), 1996 Decree-Law, article 7(3); Panama, 1960 Decree-Law, articles 61, 108(1); and Portugal, 1998 Decree-Law, article 99(2).

[729] Bosnia and Herzegovina, 2003 Law, article 47(4).

[730] See, e.g., *INS v. Stevic, U.S. Supreme Court*, 467 U.S. 407, 104 S.Ct. 2489, 81 L.Ed.2d 321, 5 June 1984 (appeal against deportation proceedings commenced respondent when he overstayed his 6-week period of admission); *Hitai v. INS*, U.S. Court of Appeals for the Second Circuit, 343 F. 2d 466, 29 March 1965 (appellant violated the terms of his permission to enter territorial State by accepting employment); *United States ex rel. Zapp et al. v. District Director of Immigration and Naturalization*, U.S. Court of Appeals for the Second Circuit, 6 June 1941 (appellants expelled for violating the conditions of their admission by ceasing to exercise the profession they were admitted to exercise); *Urban v. Minister of the Interior*, Supreme Court of South Africa, Cape Provincial District, 30 April 1953 (alien expelled for engaging in an occupation within the first three years of residence in South Africa other than that stated in the application form); *Simsek v. Minister of Immigration and Ethnic Affairs and Another*, High Court of Australia, 10 March 1982 (appellant expelled after overstaying a three-month temporary entry permit). In addition, a group of cases exists wherein ship's crew members violate the conditions of their admission to the territorial State by remaining in the territorial State after the ship sets sail. See, e.g., *Re Immigration Act Re Vergakis*, British Columbia Supreme Court, 11 August 1964, *International Law Reports*, volume 42, E. Lauterpacht (ed.), pp. 219-226; *United States ex rel. Tie Sing Eng v. Murff, District*

339. Breach of conditions for admission as a valid ground for expulsion has also been addressed with respect to migrant workers, in particular, as discussed below.[731]

(c) Public order or welfare of the State (*ordre public*)

340. The presence of an alien which is contrary to the public order or welfare (*ordre public*) of the territorial State has been recognized as a valid ground for the expulsion of aliens in treaty law, international jurisprudence, State practice[732] as well as literature. [733] The preservation of *ordre public* has been described as an essential function of the expulsion of aliens.[734]

341. Notwithstanding the recognition of *ordre public* as a ground for the expulsion of aliens, this term does not appear to have been the subject of a precise definition. The notion of *ordre public* has been described in the present context as involving the process of weighing the interests of the State as well as those of the alien in order to determine whether there is a valid ground for expulsion.[735] These

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Director, INS, Southern District of New York, 6 October 1958, 165 F. Supp. 633, affirmed *per curium*, 266 F.2d 957 (2d Cir. 1959), *certiorari* denied, 361 U.S. 840, 4 L.Ed. 2d 79, 80 Sup. Ct. 73 (1959), *International Law Reports*, vol. 26; 1958-II, E. Lauterprecht (ed.), pp. 509-512; *Sovich v. Esperdy*, U.S. Court of Appeals for the Second Circuit, 15 May 1963; *Re* Sosa, Supreme Court of Argentina, 23 March 1956.

[731] *See* Part X.C.2(a).

[732] "The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the following heads: … [i]nvolvement in 'undesirable' political activities or other wise offending against 'ordre public'. … In the provisions of municipal law it is commonly accepted that, in exercising their discretion, State authorities must also take the interests of the individual into account, and weigh them in the balance with the competing demands of 'ordre public'. Thus, it will be relevant to consider, for example, length of residence in the State, the conduct and character of the individual, family and other connections, and compassionate circumstances." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 255-256.

[733] "The State, which is in possession of a wide discretionary power, is forbidden by a general rule of international law to expel a person if there is not sufficient reason to fear that public order is endangered." Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 104. "The power of expulsion or deportation may be exercised if an alien's conduct or activities after being admitted into the state violate certain basic rules. Such conduct or activities include: … [e]ngaging in activities which … are prejudicial to public order…" Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 90-91.

[734] "The function of expulsion is to protect the essential interests of the State and to preserve 'ordre public'." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 307.

[735] "The principle of good faith and the requirement of justification, or 'reasonable cause', demand that due consideration be given to the interests of the individual, including his basic human rights, his family, property, and other connections with the State of residence, and his legitimate expectations. These must be weighed against the competing claims of 'ordre public'." Guy S. Goodwin-Gill, *International Law and the Movement of*

interests may vary from one case to another, which complicates the task of formulating a precise definition.[736] In addition, States would appear to enjoy a margin of discretion in applying this standard which requires consideration of its national interests.[737]

342. Nonetheless, the notion of *ordre public* has been described as a general legal concept whose content is determined by law.[738] The view has been expressed that the application of *ordre public* by a State as a ground for expulsion must be measured against human rights standards.[739] The view has also been expressed that the existence of *ordre public* may be the subject of determination by impartial adjudication.[740] In this regard, attention has been drawn to the *Guardianship of Infants Case* decided by the International Court of Justice in 1958.[741]

Persons between States, Oxford, Clarendon Press, 1978, p. 262. "Under the municipal law of some countries, the authorities, in exercising their discretion to expel or deport a person, should take the interests of the individual into account and balance them with the competing demands of public order. For example, these laws require that the authorities consider the length of residence in the State, the conduct and character of the individual, the family ties and other connections of the individual, and any compassionate circumstances." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 94.

[736] "It is often difficult to determine the ends for which a given discretion must be exercised or whether it has been exercised for those ends. For example, it may be said that the discretion conferred on states as regards the admission and expulsion of aliens is to be exercised in the interests of 'public order' or the 'welfare of the state.' But, as O'Connell has pointed out, '[t]he very vagueness of the notion of public order or welfare of the State makes it difficult to formulate any rules of international law on the subject other than those relating to the personal and property rights and dignity of the expelled person.'" B. O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, pp. 47-92, at p. 84 (referring to "The Admissions Case, [1948] I.C.J. 102-11, where some of the judges pointed out that the discretion there would be extremely difficult if not impossible to control") and (D. P. O'Connell, *International Law*, vol. 2, London, Stevens & Sons, 1965, pp. 766-767.).

[737] "In determining whether its interests are adversely affected by the continuing presence of the alien, or whether there is a threat to 'ordre public', the expelling State enjoys under international law a fairly wide margin of appreciation." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 262.

[738] "'Ordre public' remains a 'general legal conception' the content of which is determined by law." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 262.

[739] "While the expelling State has a margin of appreciation in applying the concept of 'ordre public', this concept is to be measured against the human rights standards." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 499.

[740] "Whether or not reasons of 'ordre public' exist is open to impartial adjudication in the light of the prescribed function of expulsion and of the international obligations which each State owes." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 262.

[741] "It has been doubted whether the State is obliged to prove the legitimacy of its reasons for expulsion, and in one case the tribunal held that when expulsion is based on grounds of public policy it will not, as a rule, review

343. Public order has been recognized as a valid ground for the expulsion of aliens in a number of treaties.

344. The Convention on the Status of Aliens provides in article 6, paragraph 1, as follows:

> "For reasons of public order or safety, states may expel foreigners domiciled, resident, or merely in transit through their territory." [742]

345. The European Convention on Establishment provides in article 3, paragraph. 1, as follows:

> "Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against *ordre public* or morality."

346. According to the Protocol to this Convention, the notions of *ordre public*, national security and morality shall be judged by each Contracting Party according to national criteria. Section I provides as follows:

> "a) Each Contracting Party shall have the right to judge by national criteria:
>
> 1. the reasons of '*ordre public* …' which may provide grounds for the exclusion from its territory of nationals of other Parties;
>
> …
>
> "3. the circumstances which constitute … an offence against *ordre public* …."

347. However, the same Protocol indicates that the concept of *ordre public* is to be understood in the "wide sense generally accepted in continental countries" and mentions examples of situations in which an expulsion may be justified on such ground. Section III a) provides as follows:

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the decision of the competent State authorities [Re Hochbaum, Ann. Dig., 1933-4, Case No. 134; Decisions of the Upper Silesian Arbitral Tribunal, vol. 5, p. 140, at p. 162.]. But this appears to be a little extreme, and the better view is that the expelling State must show 'reasonable cause', for 'ordre public' is not a term without meaning, and it is not the shorthand description of a sovereign and absolute power. In the *Guardianship of Infants Case,* Judge Lauterpacht described it as a 'general legal conception', a 'general principle of law', whose content stood to be determined by reference to the practice and experience of municipal law. Admittedly, his words were directed to the limitation of 'ordre public' as an implied reservation to treaty obligations, but the evidence of State practice suggests that a similar view is valid for expulsion matters, even in the absence of specific conventional obligations." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 230-231 (citations omitted) (referring to I.C.J. Rep., 1958, p. 55, at p. 92.).

[742] Convention on the Status of Aliens, Havana, 20 February 1928, *in* Charles I. Bevans (dir.), *Treaties and other international agreements of the United States of America 1776-1949, vol. 2: Multilateral*, 1918-1930, pp. 710-713.

> "The concept of "*ordre public*" is to be understood in the wide sense generally accepted in continental countries. A Contracting Party may, for instance, exclude a national of another Party for political reasons, or if there are grounds for believing that he is unable to pay the expenses of his stay or that he intends to engage in a gainful occupation without the necessary permits."

348. Public order has also been recognized as a valid ground for the expulsion of aliens in international jurisprudence.

349. In the *Paquet Case*, the Umpire held as follows:

> "… each State reserves to itself the exercise of this right [of expulsion] with respect to the person of a foreigner if it considers him dangerous to public order, or for considerations of a high political character, but that its application can not be invoked except to that end."[743]

350. In *Moustaquim v. Belgium*, the European Court of Human Rights recognized the concern of States to maintain public order by controlling the entry, residence and expulsion of aliens. The Court stated as follows:

> "The Court does not in any way underestimate the Contracting States' concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens."[744]

351. Within the European Union, grounds of "public policy" are admitted for the expulsion of Union citizens and members of their families. However, an expulsion decided for such grounds must be in conformity with the principle of proportionality, be based exclusively on the personal conduct of the individual concerned and take into account his personal situation. Grounds of "public policy" are only admitted if the individual represents "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". Moreover, considerations related to "general prevention" are not accepted. Attention may be drawn in this respect to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004. Preambular paragraph 23 and article 27 provide as follows:

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[743] *Paquet Case (Expulsion)*, Mixed Claims Commission Belgium-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. IX, pp. 323-325, at p. 325 (Filtz, Umpire).

[744] European Court of Human Rights, *Case of Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, para. 43. *See* also: *Case of Vilvarajah and others v. United Kingdom*, Judgment (Merits), 30 October 1991, para. 102; *Case of Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, para. 73; *Case of Ahmed v. Austria*, Judgment (Merits and Just Satisfaction), 17 December 1996, para. 38, *Case of Bouchelkia v. France*, Judgment (Merits), 29 January 1997, para. 48, and *Case of H.L.R. v. France*, Judgment (Merits), 29 April 1997, para. 33.

"(23)

Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin."

"Article 27 General principles

"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

"2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

"The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

"3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

"4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute."[745]

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[745] Corrigendum to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the

352. The grounds for expulsion relating to public security and public health are considered in Part VII.A.6(d) and (g).

353. The Court of Justice of the European Communities has considered public order as a ground for expulsion in a series of cases.

354. In *Carmelo Bonsignore v. Oberstadtdirektor der Stadt Köln*, the Court indicated that grounds of public policy may only be invoked if they are related to the personal conduct of the individual concerned, and that reasons of a "general preventive nature" are not admissible.

> "6. With this in view, article 3 of the directive [Council Directive No. 64/221, repealed with effect from 30 April 2006 by Directive 2004/38/EC, extracts of which have been reproduced above] provides that measures adopted on grounds of public policy and for the maintenance of public security against the nationals of member states of the community cannot be justified on grounds extraneous to the individual case, as is shown in particular by the requirement set out in paragraph (1) that 'only' the 'personal conduct' of those affected by the measures is to be regarded as determinative.
>
> "As departures from the rules concerning the free movement of persons constitute exceptions which must be strictly construed, the concept of 'personal conduct' expresses the requirement that a deportation order may only be made for breaches of the peace and public security which might be committed by the individual affected.
>
> "7. The reply to the questions referred should therefore be that article 3 (1) and (2) of Directive No. 64/221 prevents the deportation of a national of a member state if such deportation is ordered for the purpose of deterring other aliens, that is, if it is based, in the words of the national court, on reasons of a 'general preventive nature'."[746]

355. In *Rezguia Adoui v. Belgian State and City of Liège; Dominique Cornuaille v. Belgian State*, the Court indicated that circumstances not related to the specific case may not be relied upon to justify measures to safeguard public policy:

> "Circumstances not related to the specific case may not be relied upon in respect of citizens of the community, as justification for measures intended to safeguard public policy and public security."[747]

Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004), *Official Journal L 229*, 29 June 2004, pp. 35-48, preambular paragraph 23 and article 27.

[746] Court of Justice of the European Communities, *Carmelo Bonsignore v. Oberstadtdirektor der Stadt Köln*, Case 67-74, Judgment of the Court, 26 February 1975.

[747] Court of Justice of the European Communities, *Rezguia Adoui v. Belgian State and City of Liège; Dominique Cornuaille v. Belgian State*, Joined Cases C-115/81 and C-116/81, Judgment of the Court, 18 May 1982, operative paragraph 2.

356. A State member of the European Union may not expel a national of another member State who has been subjected to a criminal conviction without taking into account the personal conduct of the offender and the danger which he or she represents for the requirements of public policy. In the *Arios Pagos (Greece) v. Donatella Calfa* case, the Court held that legislation providing for the automatic expulsion for life of an individual found guilty of an offence under drugs laws was not compatible with the law of the European Union:

> "26. In the present case, the legislation at issue in the main proceedings requires nationals of other Member States found guilty, on the national territory in which that legislation applies, of an offence under the drugs laws, to be expelled for life from that territory, unless compelling reasons, in particular family reasons, justify their continued residence in the country. The penalty can be revoked only by a decision taken at the discretion of the Minister for Justice after a period of three years.
>
> "27. Therefore, expulsion for life automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy.
>
> "28. It follows that the conditions for the application of the public policy exception provided for in Directive 64/221 [repealed with effect from 30 April 2006 by Directive 2004/38/EC, extracts of which have been reproduced above], as interpreted by the Court of Justice, are not fulfilled and that the public policy exception cannot be successfully relied upon to justify a restriction on the freedom to provide services, such as that imposed by the legislation at issue in the main proceedings."[748]

357. In *Rezguia Adoui v. Belgian State and City of Liège; Dominique Cornuaille v. Belgian State*, the Court also held that the behaviour attributable to the individual concerned must be of a type against which repressive or other effective measures are taken by the expelling State if such behaviour is exhibited by one of its nationals.

> "A member State may not, by virtue of the reservation relating to public policy contained in articles 48 and 56 of the treaty, expel a national of another member state from its territory or refuse him access to its territory by reason of conduct which, when attributable to the former state's own nationals, does not give rise to repressive measures or other genuine and effective measures intended to combat such conduct."[749]

358. In *Georgios Orfanopoulos et al. v. Land Baden-Württemberg*, the Court further held that the threat to public policy must be current. Therefore, proper account needs to be taken of all the

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[748] Court of Justice of the European Communities, Arios Pagos (Greece) v. Donatella Calfa, Case C-348/96, Judgment of the Court, 19 January 1999.

[749] *Rezguia Adoui*, note 747 above, operative paragraph 1. The question was addressed to the Court in relation to a case of alleged prostitution.

circumstances, including factual matters having occurred after the decision on expulsion, which could have substantially diminished or eliminated the danger represented by the individual for the requirements of public policy.

> "3. Article 3 of Directive 64/221 [repealed with effect from 30 April 2006 by Directive 2004/38/EC, extracts of which have been reproduced above] precludes a national practice whereby the national courts may not take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy. That is so, above all, if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court.
>
> "4. Article 39 EC and Article 3 of Directive 64/221 [repealed with effect from 20 April 2006 by the Directive 2004/38/EC, extracts of which are reproduced above] preclude legislation and national practices whereby a national of another Member State who has received a particular sentence for specific offences is ordered to be expelled, in spite of family considerations being taken into account, on the basis of a presumption that that person must be expelled, without proper account being taken of his personal conduct or of the danger which he represents for the requirements of public policy."[750]

359. For purposes of national legislation, the notion of *ordre public* covers acts or threats against the State's internal functioning, political character or population. A State may expel an alien if the alien threatens its *ordre public* in the form of the State's constitutional order or system,[751] political, institutional or social order[752] (including with specific respect to its racial or national,[753] religious[754] or

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[750] Court of Justice of the European Communities, Georgios Orfanopoulos et al. v. Land Baden-Württemberg, Joined Cases C-482/01 and C-493/01, Judgment of the Court, 29 April 2004, operative paragraphs 3 and 4.

[751] Bosnia and Herzegovina, 2003 Law, articles 27(1)(a) and 47(1)(a); Greece, 2001 Law, article 44(1)(a); Hungary, 2001 Act, article 32(1)(a); Japan, 1951 Order, articles 5(11) and 24(4)(l); Russian Federation, 2002 Law No. 115-FZ, articles 7(1), 9(1) and 18(9)(1); 1996 Law, article 25.10; and United States, INA, section 101(a)(37).

[752] Brazil, 1981 Decree, articles 101 and 104; 1980 Law, articles 2, 64, 67 and 70; Canada, 2001 Act, articles 33 and 34(1)(a)-(b); Chile, 1975 Decree, articles 15(1), 17, 63(2), and 65(1) and (3); Greece, 2001 Law, article 44(1)(a); Guatemala, 1986 Decree-Law, article 82; Japan, 1951 Order, articles 5(11) and 24(4)(l); Republic of Korea, 1992 Act, article 11(1)(4) and (1)(8); Panama, 1960 Decree-Law, article 37(g); Russian Federation, 1996 Law, articles 25 (10) and 27(1); South Africa, 2002 Act, article 29(1)(d); and United States, INA, sections 212(a)(3)(A)(iii) and 237(a)(4)(A)(iii). While Brazil will not permit an expulsion that constitutes a prohibited extradition, and gives its Supreme Federal Court the exclusive right to determine the nature of a violation, the Court may decline to consider acts of anarchism, acts against authorities, or violent violations aimed at subverting the political or social order (Brazil, 1980 Law, articles 74, 76(2)-(3)).

[753] Belarus, 1998 Law, article 14; and South Africa, 2002 Act, article 29(1)(d).

[754] Belarus, 1998 Law, article 14.

other social relations),[755] democracy,[756] public order,[757] public safety or security,[758] law and order,[759] social or other peace,[760] welfare,[761] "best customs"[762] or culture.[763] This ground may also apply if the alien is considered subversive,[764] treasonous,[765] dangerous to the State[766] or otherwise,[767] unable or unwilling to adapt to the State's established order,[768] willing to use or advocate violence against the

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[755] Belarus, 1998 Law, article 14.

[756] Argentina, 2004 Act, articles 29(e) and 62(e); Canada, 2001 Act, articles 33 and 34(1)(a)-(b); Czech Republic, 1999 Act, section 9(1); and Germany, 2004 Act, article 54(5a).

[757] Belarus, 1998 Law, articles 14-15; 1993 Law, articles 20(2) and 25(2); Bosnia and Herzegovina, 2003 Law, articles 27(1)(h), 47(1)(i), 57(1)(i) and 59(1); Brazil, 1980 Law, article 7(II) and 26; Bulgaria, 1998 Law, article 42; Cameroon, 2000 Decree, article 65; Chile, 1975 Decree, articles 15(1), 17, 63(2), and 65(1) and (3); China, 1986 Law, articles 5 and 12; Foreign Students Regulation, article 34; Columbia, Act, article 89(2); Czech Republic, 1999 Act, section 9(1); Denmark, 2003 Act, article 25(ii); Finland, 2004 Act, sections 11(1)(5) and 168(1)-(2); France, Code, articles L213-1, L511-1(7)-(8), L521-1, L523-5 and L541-1; Greece, 2001 Law, article 44(1)(c); Italy, 1998 Decree-Law No. 286, articles 4(3), (6), 8, 9(5) and 13(1); 1998 Law No. 40, articles 4(3), (6), 7(5) and 11(1); 1996 Decree-Law, article 7(3); Madagascar, 1962 Law, articles 13-14; Norway, 1988 Act, section 58; Panama, 1960 Decree-Law, articles 18 and 36 (as amended by Act No. 6 (1980), para. 10); Portugal, 1998 Decree-Law, articles 11, 25(2)(e) and 99(1)(b); Spain, 2000 Law, article 53(d); and Switzerland, 1931 Federal Law, article 10(1)(c) and (2).

[758] Canada, 2001 Act, article 38(1)(b); China, 1993 Law, article 30; Denmark, 2003 Act, article 25(ii); Finland, 2004 Act, section 168(1)-(2); France, Code, article L521-2; Germany, 2004 Act, articles 54(4) and 55(1); Hungary, 2001 Act, article 32(1); Italy, 2005 Law, article 2(3), 1998 Decree-Law No. 286, article 15, 1996 Decree-Law, article 7(2); Japan, 1951 Order, article 5(14); Republic of Korea, 1992 Act, article 11(1)(3), (1)(8); Lithuania, 2004 Law, articles 7(5), 126(1)(3); Madagascar, 1962 Law, articles 13-14; Norway, 1988 Act, section 58; Panama, 1960 Decree-Law, article 38; Poland, 2003 Act No. 1775, article 21(1)(6); Spain, 2000 Law, article 53(d); and United States, INA, sections 212(a)(3)(F), 237(a)(4)(A)(ii).

[759] Germany, 2004 Act, article 55(1); and Guatemala, 1999 Regulation, article 97, and 1986 Decree-Law, article 82.

[760] Brazil, 1980 Law, article 64; Columbia, Act, article 89(3); Germany, 2004 Act, article 53(2); and Guatemala, 1986 Decree-Law, article 82.

[761] Japan, 1951 Order, article 7(2); and United States, INA, section 212(a)(3)(F).

[762] Portugal, 1998 Decree-Law, article 99(1)(b).

[763] Brazil, 1980 Law, article 2.

[764] China, 1986 Rules, article 7(2).

[765] United States, INA, section 237(a)(2)(D)(i).

[766] Chile, 1975 Decree, articles 15(1), 17, 63(2), and 65(1) and (3); and Sweden, 1989 Act, section 2.11(3).

[767] Brazil, 1980 Law, article 61; and Italy, 1998 Law No. 40, article 13; 1996 Decree-Law, article 7(1).

[768] Switzerland, 1931 Federal Law, article 10(1)(b).

State or for political purposes[769] or otherwise,[770] a threat to others' safety,[771] rights or legal interests,[772] or a threat to industrial activity.[773] External threats and international terrorism are considered as national security grounds for expulsion, which are discussed in Part VII.A.6(d).

360. The ground of *ordre public* may apply to an alien on the basis of membership in an organization that engages in activities raising *ordre public* concerns.[774] *Ordre public* concerns may[775] or may not[776] affect the alien's legal ability to hold transitory status in the State. They may likewise affect the conditions imposed on the alien while in the State's territory.[777] The alien's status under this heading may depend in part on (1) whether the alien comes from a State having a special arrangement or relationship with the expelling State;[778] or (2) the expelling State's express application of an international human rights convention's terms when considering grounds for expulsion under this heading.[779] The relevant legislation may expressly permit the application of criminal penalties in addition to expulsion when grounds exist under this heading.[780]

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[769] Chile, 1975 Decree, articles 15(1), 17, 63(2), 65(1), (3); Czech Republic, 1999 Act, section 9(1); Germany, 2004 Act, articles 54(5a), 55(2); Japan, 1951 Order, articles 5(11)-(12), 24(4)(l)-(m); Panama, 1960 Decree-Law, article 37(g)-(h); Sweden, 1989 Act, section 4.11; and United States, INA, sections 212(a)(3)(A)(iii), 237(a)(4)(A)(iii).

[770] Canada, 2001 Act, articles 33, 34(1)(e); China, 1986 Rules, article 7(2); Germany, 2004 Act, article 54(4); Republic of Korea, 1992 Act, article 46(1)-(2); and Russian Federation, 2002 Law No. 115-FZ, articles 7(1), 9(1), 18(9)(1).

[771] Canada, 2001 Act, articles 33, 34(1)(e); Finland, 2004 Act, section 149(3); Russian Federation, 2002 Law No. 115-FZ, articles 7(1), 9(1), 18(9)(1); and Sweden, 1989 Act, section 4.7(2).

[772] Belarus, 1998 Law, articles 14-15, 1993 Law, articles 20(1), 25(1); and China, Foreign Students Regulation, article 34.

[773] Japan, 1951 Order, articles 5(12)(c), 24(4)(m)(3).

[774] Bosnia and Herzegovina, 2003 Law, articles 27(1)(a), 47(1)(a); Hungary, 2001 Act, article 32(1)(a); Japan, 1951 Order, articles 5(11)-(13), 24(4)(l)-(n); Panama, 1960 Decree-Law, article 37(g); and United States, INA, section 212(a)(3)(F).

[775] Brazil, 1980 Law, article 93; and Panama, 1960 Decree-Law, article 36 (as amended by Act No. 6 (1980), para. 10).

[776] Japan, 1951 Order, article 24(4), which exempts transitory-status aliens from certain expulsion provisions based on *ordre public* concerns, including with respect to the attempted or advocated overthrow of the Japanese Constitution or Government.

[777] Republic of Korea, 1992 Act, article 22.

[778] Finland, 2004 Act, section 168(1)-(2); Italy, 1998 Law No. 40, article 45(2)(b); Norway, 1988 Act, section 58; and Portugal, 1998 Decree-Law, articles 11, 25(2)(e).

[779] Bosnia and Herzegovina, 2003 Law, article 59(1)-(2).

[780] Italy, 2005 Law, article 13(1); and Portugal, 1998 Decree-Law, article 99(2).

361. National courts have also addressed cases involving expulsion on the ground of public order.[781] In some instances, convictions for criminal offences committed in other States have provided a basis for expulsion on the ground of maintaining *ordre public*.[782]

362. The notion of public order as a ground for expulsion is also addressed with respect to specific categories of aliens, including long-term residents, migrant workers, refugees and stateless persons as discussed below.[783]

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[781] *See*, e.g., *Keledjian Garabed v. Public Prosecutor*, Court of Cassation (Chambre Criminelle), 17 December 1937; *Maffei v. Minister of Justice*, Conseil d'État (Comité du Contentieux), 12 November 1980, *International Law Reports*, volume 73, E. Lauterpacht (ed.), C.J. Greenwood, pp. 652-657; *In re Salon*, Conseil d'État, 3 April 1940, *Annual Digest and Reports of Public International Law Cases*, 1919-1942 (Supplementary Volume), H. Lauterpacht (ed.), Case No. 105, pp. 198-199.

[782] *See*, e.g., *Expulsion Order Case*, "In determining the admissibility of the expulsion order the Administrative Court rightly took into account those offences committed by the plaintiff in Switzerland. The *AuslG* does not provide for expulsion exclusively on the ground of offences committed within the Federal Republic (Article 10 *AuslG)*. Indeed public order and security within the Federal Republic may be threatened merely by the fact that a dangerous criminal is residing within its territory. Consideration of offences committed abroad, against which the Federal Constitutional Court in its judgment of 12 February 1964 expressed no basic objection *(DVBL* 1966, p. 643), cannot be denied as long as these offences are equally punishable under German law *(DVBL* 1965, p. 921)." *Expulsion Order Case*, Federal Republic of Germany, Supreme Administrative Court of Hesse, 13 November 1968, *International Law Reports*, volume 61, E. Lauterpacht (ed.), C.J. Greenwood, pp. 436-443, at p. 441; *King v. Brooks and Minister of Citizenship and Immigration*, Manitoba Court of Appeal, 25 October 1960, *International Law Reports*, volume 32, E. Lauterpacht (ed.), pp. 249-251; *In re Everardo Diaz*, Supreme Federal Tribunal of Brazil, 8 November 1919, *Annual Digest of Public International Law Cases*, 1919-1922, Sir John Fischer Williams and H. Lauterpacht (eds.), Case No. 179, pp. 254-257 [expulsion from Brazil in connection with a conviction for involvement in a bombing in Argentina]. But see *Residence Prohibition Order Case (2)*, Federal Republic of Germany, Superior Administrative Court of Münster, 1 October 1968, *International Law Reports*, volume 61, E. Lauterpacht, C.J. Greenwood (eds.), pp. 433-436 [expulsion order for conviction for aiding German troops during second world war quashed since alien did not constitute a threat to the public order and would be subjected to continued punishment for a political crime if expelled to his State of nationality]. But see *Homeless Alien (Germany) Case*, note 702 above, p. 507 ("Not every criminal offence justifies expulsion for reasons of public order."); *M. v. Secretary of State for the Home Department*, Court of Appeal, United Kingdom, (2003) WLR 1980 (CA) [where expulsion for commission of crimes is overturned by Court, issuance of a new expulsion order on the grounds of public good must be justified by Secretary of State; conviction for indecent assault must be balanced against serious hardship to alien and his family caused by expulsion].

[783] *See* Parts X.B.2(a), X.C.2(a), X.E.1(a) and X.F.1.

(d) National security

363. National security (or "public safety") has been recognized as a valid ground for the expulsion of aliens in treaties, international jurisprudence, State practice[784] as well as literature.[785]

364. The State would appear to have broad discretion in determining whether the presence of an alien in its territory constitutes a threat to, endangers or is otherwise contrary to its national security interests.[786] However, it has been suggested that the national security ground for expulsion may be subject to a requirement of proportionality.

> "Some treaties require States not to expel aliens, unless there are specific reasons [e.g., national security]. … It would be difficult to deny the expelling State some discretion in establishing whether a danger to national security exists and whether in the specific case the

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[784] "State practice accepts that expulsion is justified: … in the light of political and security considerations." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 262. "The interests of national security are almost invariably a ground for expulsion of an alien." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 467 (citing Australia, Migration Act, 1958, sections 12,14; Belgium, Law of 15 December 1980, article 20(1); Chile, Law No. 12,927 of 6 August 1956, article 3; Denmark, Aliens Act No. 226 of 8 June 1983, section 12; Federal Republic of Germany, *Auslandergesetz* (Aliens Law) of 28 April 1965, BGB1. 1965 I, 353, article 10; Ghana, Aliens Act 1933, section 12; India, Foreigners Act 1946, section 2(c), as interpreted in *Hans Muller v. Superintendent, Presidency Gaol*, [1955] A.I.R. 367 (S.C.); Ireland, Aliens Order 1946, section 13; Netherlands, Aliens Act 1965, section 12; Nigeria, Immigration Act, No. 6 of 1963, as amended by Decree No. 8 of 1972; Norway, Aliens Act 1956, section 15; Poland, Aliens Law of 29 March 1963, Dz. U. 1963 No. 15, article 9; Portugal, Decree-Law 264-B181, article 42; Turkey, Act on Residence and Travel of Aliens, No. 5683 of 15 July 1980, article 19).

[785] "The power of a state to protect its security is a core attribute of sovereignty. Although there is no comprehensive instrument relating to migration and security, it is clear that states possess authority, under international law, to limit and control migration on national security grounds; and the exclusion and expulsion of persons thought to pose a threat to the national security of a state is firmly embedded in state practice." Alexander T. Aleinikoff, note 119 above, p. 5. "The power of expulsion or deportation may be exercised if an alien's conduct or activities after being admitted into the state violate certain basic rules. Such conduct or activities include: … [e]ngaging in activities which endanger the security of the State …" Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Pelicy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 90-91.

[786] "Where the grounds for deportation involve matters of national security, the courts may be reluctant to restrain the exercise of the Minister's discretion …" Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 943, n. 13 (citing see *R. v. Secretary of State for the Home Department, ex parte Hosenball* [1977] 3 All ER 452). "The grounds for removal of aliens in United Kingdom law bear obvious similarities to those current in the municipal law of the United States of America. They may be summarized as follows: 4. Offences against 'ordre public', including political matters and matters affecting national security. In respect to the fourth general category, United Kingdom law is remarkable for the wide measure of discretion which it leaves to the executive; it is only with difficulty that such areas may be subjected to the control of detailed rules." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 251.

> presence of the concerned individual affects it. It is clear that the expelling State is in the best position to assess the existence of a threat to its own security and public order. The State will make an appreciation on the basis of the circumstances that are known at the time of expulsion; a later judgement based on hindsight would not seem fair. Thus, from the point of view of a supervising body it seems justified to leave the expelling State a 'margin of appreciation' – to borrow from the language used by the European Court of Human Rights and the Human Rights Committee. This margin does not only affect the power of review that a judicial or other body may have, but also the extent of the State's obligation.
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> "On the other hand, when the restrictions in question apply, proportionality is also required. In other words, even when a State is entitled to consider that an alien represents a danger to national security, expulsion would nevertheless be excessive if the appraised danger is only minimal."[787]

365. National security or public safety has been recognized as a valid ground for the expulsion of aliens in a number of treaties.

366. The Convention on the Status of Aliens provides in article 6, paragraph 1, as follows:

> "For reasons of public order or safety, states may expel foreigners domiciled, resident, or merely in transit through their territory."

367. The European Convention on Establishment provides in article 3, paragraph 1, as follows:

> "Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against *ordre public* or morality."[788]

368. Within the European Union, grounds of public security are also recognized as valid in order to justify the expulsion of Union citizens and their family members. Such grounds are mentioned in article 27 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, reproduced in Part VII.A.6(c).

369. In terms of international jurisprudence, attention may be drawn to the arbitral award delivered in the *J. N. Zerman v. Mexico* case. The Umpire clearly affirmed the right of a State to expel an alien based on reasons relating to national security. However, he indicated that in a situation where there is no war, a State cannot expel an alien as a threat to national security without preferring charges against the alien or subjecting him or her to trial.

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[787] Giorgio Gaja, note 28 above, p. 296.

[788] Public order and morality as grounds for expulsion are discussed in Parts VII.A.6(c) and VII.A.6(h), respectively.

> "The umpire is of opinion that, strictly speaking, the President of the Republic of Mexico had the right to expel a foreigner from its territory who might be considered dangerous, and that during war or disturbances it may be necessary to exercise this right even upon bare suspicion; but in the present instance there was no war, and reasons of safety could not be put forward as a ground for the expulsion of the claimant without charges preferred against him or trial; but if the Mexican Government had grounds for such expulsion, it was at least under the obligation of proving charges before the commission. Its mere assertion, however, or that of the United States consul in a dispatch to his government, that the claimant was employed by the imperialist authorities does not appear to the umpire to be sufficient proof that he was so employed or sufficient ground for his expulsion."[789]

370. National security is recognized as a valid ground for the expulsion of aliens in the national laws of a number of States. In recent years, the threat to national security resulting from international terrorism has been an increasingly frequent consideration in the expulsion of aliens on such a ground. Several States have amended their national legislation in order to more effectively address this concern, such as France,[790] Germany,[791] Italy[792] and the United States[793]. The United Kingdom has announced a new policy with respect to deportation for activities relating to fomenting or provoking terrorism and new legislation to that effect is pending.[794] The notion of "national security" may be

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[789] J. N. Zerman v. Mexico, Award of 20 November 1876, in John Bassett Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party, vol. IV, p. 3348.

[790] Proposition de loi relative aux conditions permettant l'expulsion des personnes visées à l'article 26 de l'ordonnance n° 45-2658 du 2 novembre 1945, adopted by French National Assembly on first reading N° 309, 17 June 2004.

[791] "German states such as Bavaria are making use of a Jan. 1, 2005, federal law that allows them to expel legal foreign residents who 'endorse or promote terrorist acts,' or incite hatred against sections of the population." Benjamin Ward, Expulsion doesn't help, *International Herald Tribune*, 2 December 2005, at www.iht.com/articles/2005/12/02/opinion/ edward.php (accessed 26 January 2006). See Germany, 2004 Act, articles 54(5) and (6), 55(2)(8)(a), which incorporate the relevant anti-terrorism provisions.

[792] "Italy has expelled at least five imams since 2003, and an anti-terrorism law adopted on July 31, 2005, makes it even easier to do so." Benjamin Ward, note 791 above. See generally Italy, 2005 Law.

[793] See United States, INA, sections 212(a)(3)(B) and (F), 237(a)(4)(B), and Title V generally for relevant anti-terrorism provisions.

[794] Following the London transport system bombings of 7 July 2005, the British Home Secretary Charles Clarke announced that he will use his powers to deport from the United Kingdom any non-UK citizen who attempts to foment terrorism or provokes others to commit terrorist acts, by any means or medium, including – but not limited – to: (1) writing, producing, publishing or distributing material; (2) public speaking, including preaching; (3) running a website; or (4) using a position of responsibility such as teacher, community or youth leader to express views which: (a) foment, justify or glorify terrorist violence in furtherance of particular beliefs (b) seek to provoke others to terrorist acts (c) foment other serious criminal activity or seek to provoke others to serious criminal acts or (d) foster hatred which might lead to inter-community violence in the UK. Home Office Press Notice 118/2005, Exclusion or Deportation from the UK on Non-Conducive Grounds: Consultation Document, 5 August 2005. The Terrorism Bill pending before Parliament would, if enacted: "(1) outlaw

broadly interpreted to encompass acts or threats directed against the existence or external security of the territorial State *as well as possibly other States*, as discussed below.

371. A State may expel an alien if the alien threatens its security in the form of its existence,[795] national sovereignty,[796] external security[797] or national security or national safety[798] (including that of a component entity such as a state or territory).[799] A State may do likewise if the alien (1) is suspected of espionage[800] or sabotage;[801] (2) engages in, assists, advocates, intends or is prone to terrorism;[802] or

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encouragement or glorification of terrorism (2) create a new offence to tackle extremist bookshops who disseminate radical material (3) make it illegal to give or receive terrorist training or attending a 'terrorist training camp' (4) create a new offence to tackle those planning or preparing to commit terrorist acts (5) extend the maximum limit of pre-charge detention in terrorist cases to three months and (6) widen the grounds for proscription to include groups which glorify terrorism." Home Office Press Notice 148/2005.

[795] Columbia, Act, article 89(2).

[796] Chile, 1975 Decree, articles 15(1), 17, 63(2), 65(1), (3); Hungary, 2001 Act, article 32(1); and Paraguay, 1996 Law, article 81(7).

[797] Chile, 1975 Decree, articles 15(1), 17, 63(2), 65(1), (3); and Switzerland, 1931 Federal Law, article 10(4).

[798] Australia, 1958 Act, articles 200, 202; Belarus, 1998 Law, articles 14-15, 32, 1993 Law, articles 20(2), 25(2), Bosnia and Herzegovina, 2003 Law, articles 27(1)(h), 47(1)(i), 57(1)(i); Brazil, 1981 Decree, articles 101, 104, 1980 Law, articles 2, 64, 67, 70; Bulgaria, 1998 Law, article 42; Canada, 2001 Act, articles 33, 34(1)(d); Chile, 1975 Decree, article 2; China, 1986 Law, articles 5, 12, 1986 Rules, article 7(6); Columbia, Act, article 89(2)-(3); Czech Republic, 1999 Act, section 9(1); Denmark, 2003 Act, article 25(i); Finland, 2004 Act, sections 11(1)(5), 149(4), 168(1)-(2); France, Code, articles L521-2, L523-3; Germany, 2004 Act, article 54(5a); Greece, 2001 Law, article 44(1)(c); Guatemala, 1999 Regulation, article 97, 1986 Decree-Law, article 82; Hungary, 2001 Act, article 32(1); Italy, 1998 Decree-Law No. 286, articles 4(3), (6), 8, 9(5), 13(1), 1998 Law No. 40, articles 4(3), (6), 7(5), 11(1), 1996 Decree-Law, article 7(3); Japan, 1951 Order, article 24(4)(o); Kenya, 1973 Act, article 3(1)(h); Nigeria, 1963 Act, article 18(1)(d); Norway, 1988 Act, section 29(d); Panama, 1960 Decree-Law, article 36 (as amended by Act No. 6 (1980), para. 10); Poland, 2003 Act No. 1775, articles 21(1)(6), 88(1)(5); Portugal, 1998 Decree-Law, articles 11, 25(1)(e), 99(1)(b); Russian Federation, 1996 Law, articles 25.10, 27(1); Sweden, 1989 Act, section 4.11; Switzerland, Federal Constitution, article 121(2), 1931 Federal Law, article 10(4); and United States, INA, sections 212(a)(3), 237(a)(4)(A)(ii), 501(3).

[799] Australia, 1958 Act, article 202(1)(a).

[800] Canada, 2001 Act, articles 33, 34(1)(a); Sweden, 1989 Act, sections 2.11(3), 4.2(4); and United States, INA, sections 212(a)(3)(A)(i)(I), 237(a)(2)(D)(i), (4)(A)(i).

[801] Sweden, 1989 Act, sections 2.11(3), 4.2(4); and United States, INA, section 237(a)(2)(D)(i), (4)(A)(i).

[802] Argentina, 2004 Act, articles 29(d)-(e), 62(e); Belarus, 1998 Law, articles 9, 14; Bosnia and Herzegovina, 2003 Law, article 57(1)(g); Canada, 2001 Act, articles 33, 34(1)(c), 35(1)(b); China, 1986 Rules, article 7(2); France, Code, article L521-3; Germany, 2004 Act, articles 54(5)-(6), 55(2); Hungary, 2001 Act, article 32(1)(b); Italy, 2005 Law, articles 3(1)-(3), 15(1)-(1*bis*); Panama, 1960 Decree-Law, article 37(h); Russian Federation, 2002 Law No. 115-FZ, articles 7(2), 9(2), 18(9)(2); South Africa, 2002 Act, article 29(1)(b), (e); and United States, INA, sections 212(a)(3)(B), (F), 237(a)(2)(D), (4)(B), 501(1). While Brazil will not permit an expulsion that constitutes a prohibited extradition, and gives its Supreme Federal Court the exclusive right to determine the

(3) intends or has committed subversion, violence or other aggression against any government, institution or process (rather than against the expelling State alone),[803] one of a specified group of governments,[804] a democratic government,[805] an international organization,[806] or an international competition or conference.[807]

372. A State may apply the national security ground for expulsion to a senior official of a foreign government,[808] or to an alien on the basis of the alien's membership in an organization that engages in activities raising national security concerns.[809] A State may also (1) reserve the right to try an alien on national security grounds;[810] (2) expressly apply the terms of an international human rights convention when finding grounds for expulsion for reasons of national security;[811] or (3) expressly provide for wartime or other national emergency measures.[812] National security concerns may affect the legal ability of an alien to hold transitory status in the State.[813] An alien's status under this heading may depend in part on whether the alien comes from a State having a special arrangement or relationship with the expelling State.[814]

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nature of a violation, the Court may decline to consider acts of terrorism or acts against Heads of State (Brazil, 1980 Law, articles 74, 76(2)-(3)).

[803] Canada, 2001 Act, articles 33, 34(1)(b); Ecuador, 2004 Law, article 3; Italy, 2005 Law, article 15; Republic of Korea, 1992 Act, article 46(1)-(2); and Portugal, 1998 Decree-Law, articles 11, 25(2)(e).

[804] Sweden, 1989 Act, sections 2.11(3), 4.2(4).

[805] Canada, 2001 Act, articles 33, 34(1)(a).

[806] Italy, 2005 Law, article 15.

[807] Japan, 1951 Order, articles 5(5)-2, 24(4)-3.

[808] Canada, 2001 Act, article 35(1)(b). Canada expressly permits its relevant Minister to consider Canada's national interest in making such a determination (Canada, 2001 Act, article 35(2)).

[809] Belarus, 1998 Law, articles 9, 14; Canada, 2001 Act, articles 33, 34(1)(f); Germany, 2004 Act, article 54(5)-(6); Hungary, 2001 Act, article 32(1)(a)-(b); Italy, 2005 Law, article 3(1)-(2); and United States, INA, section 212(a)(3)(F).

[810] Argentina, 2004 Act, articles 29, 35; Guatemala, 1986 Decree-Law, article 82; Italy, 2005 Law, article 13(1); Portugal, 1998 Decree-Law, article 99(2); and United States, INA, section 236A(a)(5).

[811] Bosnia and Herzegovina, 2003 Law, article 59(1)-(2).

[812] Kenya, 1973 Act, article 3(1); Nigeria, 1963 Act, article 45; Sweden, 1989 Act, sections 12.4-5; and United States, INA, sections 212(a)(8)(B), 241(b)(2)(F), 331.

[813] Brazil, 1980 Law, article 93; and Panama, 1960 Decree-Law, article 36 (as amended by Act No. 6 (1980), para. 10).

[814] Finland, 2004 Act, section 168(1)-(2); Italy, 1998 Law No. 40, article 45(2)(b); Norway, 1988 Act, section 58; and Portugal, 1998 Decree-Law, articles 11, 25(2)(e).

373. The national jurisprudence of some States also supports national security as a valid ground for the expulsion of aliens.[815] Moreover, in recent years a new line of cases has emerged, specifically dealing with the national security issues raised by aliens suspected of involvement in international terrorism.[816] The national court decisions may indicate the following trends with respect to international terrorism as a national security ground for the expulsion of aliens which also emerge to some extent from recent legislation: (1) *national* security with respect to international terrorism includes direct or indirect threats to the State in the light of the interdependent security of States and the global reach of international terrorism; (2) national *security* includes not only military defense but also democracy and the legal and constitutional systems of the State; and (3) an objectively reasonable *suspicion* of a threat based on international terrorism is sufficient evidence of a national security ground for expulsion, similar to the evidentiary standard that has been used for the expulsion of aliens in time of armed conflict; and (4) the threatened harm must be *substantial* rather than negligible.

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[815] *See*, e.g., *Suresh v. Canada*, note 471 above; *Secretary of State v. Rehman*, United Kingdom, House of Lords, 3 WLR 877 (2001), 11 October 2001, *International Law Reports*, volume 124, E. Lauterpacht (ed.), p. 511; *Perregaux*, France, Conseil d'État, 13 May 1977, *International Law Reports*, volume 74, E. Lauterpacht, C.J. Greenwood (eds.), pp. 427-430. "In my judgment it is impossible for us to say that this decision of the Secretary of State, that the deportation of Mr. Chahal would be conducive to the public good for reasons of national security, was irrational, or perverse, or based on any misdirection." *R v. Secretary of State for the Home Department, ex parte Chahal*, Court of Appeal of England 22 October 1993, *International Law Reports*, volume 108, E. Lauterpacht, C.J. Greenwood, A.G. Oppenheimer (eds.), pp. 363-384, at p. 370. "But this is no ordinary case. It is a case in which national security is involved: and our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place. Even natural justice itself may suffer a set-back. […] Deportation on this ground has always been treated separately from other grounds of deportation." *R. v. Secretary of State for Home Affairs, ex parte Hosenball*, Court of Appeal of England, 29 March 1977, *International Law Reports*, volume 73, E. Lauterpacht, C.J. Greenwood (eds.), pp. 635-651, at pp. 638-639.

[816] A and others v. Secretary of State for the Home Department; X and another v. Secretary of State for the Home Department, House of Lords, 16 December 2004 (Cases Nos. [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169); *Suresh v. Canada*, note 471 above; Secretary of State v. Rehman, House of Lords, United Kingdom, 3 WLR 877 (2001), 11 October 2001, International Law Reports, volume 124, E. Lauterpacht (ed.), p. 511); *R v. Secretary of State*, note 815 above; Abd al Nasser al Aziz Abd al Affo, et al. v. Commander of I.D.F. Forces in the West Bank, Supreme Court of Israel, 10 April 1988, International Legal Materials, vol. 29, 1990, pp. 139-181, at p. 140; Oudjit v. Belgian State (Minister of Justice), Conseil d'État, 10 July 1961, International Law Reports, volume 31, 1966, E. Lauterpacht (ed.), pp. 353-355, at p. 353. M. et Mme Mohammed X., Cour Administrative d'Appel de Marseille, 14 juin 2004, N° 01MA01625, Publié au Recueil Lebon; Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c. M. Bouziane, Conseil d'État, 4 octobre 2004; M. Ali A., Conseil d'État, 18 March 2005, No. 278615, Publié au Recueil Lebon. In some cases, it appears that the standard of proof necessary to justify expulsion on this ground would not be sufficient to sustain an extradition proceeding or prosecution. For example, in a recent Italian case, a suspected terrorist, Mohamed Daki, was expelled after having been found not guilty of terrorism charges by an Italian court. www.repubblica.it/2005/l/sezioni/cronaca/daki1/daki1/daki1.html (accessed 10 February 2006). "All are foreign (non-United Kingdom) nationals. None has been the subject of any criminal charge. In none of their cases is a criminal trial in prospect." Cf. A and others v. Secretary of State for the Home Department, United Kingdom House of Lords, 16 December 2004, [2004] UKHL 56.

374. In this regard, Lord Slynn of Hadley, in the House of Lords decision in *Secretary of State v. Rehman*, pointed out that:

> "It seems to me that, in contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. ... To require the matters in question to be capable of resulting 'directly' in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state, need to be protected."[817]

375. A similar conclusion was reached by the Supreme Court of Canada in *Suresh v. Canada*, noting that:

> "Whatever the historic validity of insisting on direct proof of specific danger to the deporting country, as matters have evolved, we believe courts may now conclude that the support of terrorism abroad raises a possibility of adverse repercussions on Canada's security: see *Rehman, supra, per* Lord Slynn of Hadley, at paras. 16 and 17. International conventions must be interpreted in the light of current conditions. It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid. [...] These considerations lead us to conclude that a person constitutes a 'danger to the security of Canada' if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be 'serious', in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible."[818]

376. National security as a ground for the expulsion of aliens is also addressed with respect to specific categories of aliens, including long-term residents, migrant workers, refugees and stateless persons as discussed below.[819]

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[817] *Secretary of State v. Rehman*, House of Lords, United Kingdom, 3 WLR 877 (2001), 11 October 2001, *International Law Reports*, volume 124, E. Lauterpacht (ed.), pp. 511-550, at p. 534 (Lord Slynn of Hadley).

[818] *Suresh v. Canada*, note 471 above, pp. 371-372, paras. 87 and 90.

[819] *See* Parts X.B.2(a); X.C.2(a); X.E.1(a); and X.F.1.

(e) Higher interest of the State

377. The higher interest of the State may be considered as a relevant factor in determining the expulsion of an alien on the basis of the public order or welfare of a State (*ordre public*) rather than as a separate ground under international law.

378. National laws specify a variety of grounds for the expulsion of an alien, which may be grouped under the general heading of the "higher interest of the State".[820] In particular, a State may expel an alien who is perceived to endanger or threaten its national or public interests,[821] fundamental interests,[822] substantial interests,[823] dignity (including that of the State's nationals),[824] national "utility"[825] or convenience,[826] social necessity,[827] public[828] or foreign[829] policy, international agreements[830] or international relations with other States[831] or generally.[832]

379. A State may expressly base a determination under this heading partly or wholly on its obligations under international agreements,[833] its diplomatic relations,[834] or a consideration of the

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[820] *See* Preliminary report on the expulsion of aliens, by Maurice Kamto, Special Rapporteur, *International Law Commission*, A/CN.4/554, Annex I (Draft Workplan), Part 1, II.C.1(c).

[821] Australia, 1958 Act, article 197AD; Bosnia and Herzegovina, 2003 Law, articles 27(1)(b), 47(1)(b); Brazil, 1981 Decree, article 98, 1980 Law, articles 1-3, 7, 56(2), 64, 66; Canada, 2001 Act, articles 34(2), 35(2), 37(2); Chile, 1975 Decree, articles 2, 15(1), 63(2), 65(1), (3); China, 1986 Rules, article 7(6); Guatemala, 1999 Regulation, article 97; Japan, 1951 Order, articles 5(14), 24(4)(o); Kenya, 1967 Act, article 3(1)(g); Republic of Korea, 1992 Act, article 11(1)(3), (1)(8); Nigeria, 1963 Act, articles 19(2), 35(1); Poland, 2003 Act No. 1775, articles 21(1)(6), 88(1)(5); Portugal, 1998 Decree-Law, article 99(1)(c); and Sweden, 1989 Act, section 4.7(2).

[822] France, Code, article L521-3.

[823] Germany, 2004 Act, article 55(1).

[824] Portugal, 1998 Decree-Law, article 99(1)(c).

[825] Chile, 1975 Decree, articles 64, 66.

[826] Brazil, 1980 Law, article 26; and Chile, 1975 Decree, articles 64, 66.

[827] Panama, 1960 Decree-Law, article 38.

[828] Lithuania, 2004 Law, articles 7(5), 126(1)(3); and Poland, 2003 Act No. 1775, articles 21(1)(6), 88(1)(5).

[829] United States, INA, section 212(a)(3)(C).

[830] Czech Republic, 1999 Act, section 9(1).

[831] Chile, 1975 Decree, articles 64(3), 66; Finland, 2004 Act, section 149; and Honduras, 2003 Act, article 89(3).

[832] Czech Republic, 1999 Act, section 9(1); Finland, 2004 Act, section 11(1)(5); and Italy, 1998 Decree-Law No. 286, articles 4(6), 8; 1998 Law No. 40, article 4(6).

[833] Italy, 1998 Decree-Law No. 286, articles 4(3), (6), 8, 1998 Law No. 40, article 4(6); and Spain, 2000 Law, article 26(1).

[834] Guatemala, 1986 Decree-Law, article 83; and South Africa, 2002 Act, article 29(1)(b).

international relations of other States with which it has a special arrangement.[835] A State may also expressly seek to maintain political neutrality when dealing with the expulsion of aliens under this heading.[836] Grounds relating to the "higher interest of the State" may also apply to an alien on the basis of the alien's membership in an organization that engages in activities raising concerns about the State's interests.[837] Furthermore, a State's interest may affect the conditions or obligations imposed on the alien when entering or while staying in the State's territory.[838] Violation of the conditions for entry into the territory of the State may constitute a separate ground for expulsion as discussed in Part VII.A.6(a).

(f) Violation of law

380. An alien is subject to the national law and jurisdiction of the State in which he or she is present under the principle of the territorial jurisdiction of a State.[839] Failure to comply with the national law of the territorial State may be a valid ground for expulsion. The validity of this ground for expulsion has been recognized in the European Union, State practice[840] and

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[835] An example of such an arrangement is the Schengen Accord (*see* Portugal, 1998 Decree-Law, articles 11, 25(1), (2)(e)).

[836] Ecuador, 2004 Law, article 3.

[837] Bosnia and Herzegovina, 2003 Law, articles 27(1)(b) and 47(1)(b).

[838] Australia, 1958 Act, articles 197AB, 197AG; Brazil, 1980 Law, article 109; Republic of Korea, 1992 Act, article 22; and United States, INA, section 212(f). The alien may be expressly required not to prejudice the interests of the State in the exercise of the alien's rights and freedoms (Belarus, 1993 Law, article 3; and China, 1986 Law, article 5).

[839] As discussed previously, there are special categories of aliens, such as diplomats, who are entitled to special privileges and immunities. These aliens are not considered in the present section. "With his entrance into a state, an alien falls at once under its territorial supremacy, although he remains at the same time under the personal supremacy of his home state. He is therefore, unless he belongs to one of those special classes (such as diplomats) who are subject to special rules, under the jurisdiction of the state in which he stays, and is responsible to it for all acts he commits on its territory. … Since an alien is subject to the territorial supremacy of the local state, it may apply its laws to aliens in its territory, and they must comply with and respect those laws." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 904-905 (citations omitted).

[840] "The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the following heads: … 4. Involvement in criminal activities. […] State practice accepts that expulsion is justified… for involvement in criminal activities…" Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 255 and 262. "Very commonly, an alien's deportation may be ordered … on account of the alien's criminal behaviour". Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, pp. 468 and 482, n. 119 (referring to Denmark, Aliens Act No. 226 of 8 June 1983, article 25(1); Norway: Aliens Act 1956, sector 13(l)(d); Portugal, Decree-Law 264-B181, article 42; Sweden, Aliens Act (*Utlanningslag*) No. 376 of 1980, Prop. 1979/80:96, section 40; Turkey, Act on Residence and Travel of Aliens, No. 5683 of 15 July 1980, article 22).

literature.[841] In some instances, this ground for expulsion may be extended to the unlawful activity of an alien in a State other than the territorial State.[842]

381. The view has been expressed that the expulsion of an alien is a measure undertaken to protect the interests of the territorial State rather than to punish the alien.[843] Whereas criminal activity may be a ground for expelling an alien, the expulsion of the alien is to be determined based on the need to protect the interests of the territorial State rather than to punish the alien. Nonetheless, expulsion or deportation may be provided for as a punishment for a crime committed by an alien under the national criminal law – rather than the immigration law – of the State concerned.[844] It should be noted that different substantive and procedural law may apply with respect to a criminal proceeding in contrast to an expulsion proceeding. The relationship between the two proceedings may vary under the national laws of different States.

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[841] "It is accepted that expulsion is justified for activities in breach of the local law, and, further, that the content of that local law is a matter for the expelling State alone." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 206 (citations omitted). See also *Règles internationales*, note 56 above, article 28, paras. 5 and 6.

[842] "In some countries, e. g., in Belgium and Luxemburg, expulsion may be ordered for crimes committed abroad, presumably only when a conviction has been had." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 52.

[843] "Deportation is, after all, intended not as a punishment but primarily as a method of relieving the expelling country of the presence of an individual considered to be undesirable ..." John Fischer Williams, "Denationalization", *British Yearbook of International Law*, vol. 8, 1927, pp. 45-61, at pp. 58-59. "Expulsion is a measure primarily directed to the protection of the interests of the State. It is not essentially a measure for the punishment of aliens, although obviously its effects may be devastating." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 257. "Expulsion is, in theory at least, not a punishment, but an administrative measure consisting in an order of the government directing a foreigner to leave the country." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 945 (citations omitted). "Expulsion of an alien is not a punishment, but an executive act comprising an order directing the alien to leave the state." Shigeru Oda, "Legal Status of Aliens", *in* Sørensen, Max (dir.) *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, at p. 482. «L'expulsion, n'étant pas une peine, doit être exécutée avec tous les ménagements possibles, en tenant compte de la situation particulière de la personne.» *Règles internationales*, note 56 above, article 17. [English translation] "Expulsion is not a punishment and must therefore be executed with the utmost consideration and taking into account the individual's particular situation."

[844] "In particular, as a State is entitled to punish an alien who commits a gross violation of its laws while in its territory, in certain instances such punishment may include the expulsion or deportation of an alien convicted for a major crime." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 89. "The following features of recent developments in the exercise of the power of expulsion may be noted: It is used as a supplementary penalty against the alien for the more important crimes ..." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 55.

382. Within the European Union, recourse to expulsion as a penalty is limited in many respects.[845] According to article 33 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, expulsion may not be inflicted as a penalty to Union Citizens or members of their family, unless such a measure satisfies the requirements of other provisions of the same Directive allowing expulsion for reasons of public policy, public security or public health.

> "Article 33 Expulsion as a penalty or legal consequence
>
> "1. Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27,[846] 28[847] and 29.[848]
>
> "2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued."[849]

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[845] For an analysis of issues relating to expulsion as a double penalty in the national laws and practice of member States of the European Union, including Belgium, Denmark, France, Germany, Italy, Portugal and United Kingdom, see *La double peine*, les Documents de travail du Sénat, France, série Législation comparée, Division des etudes de legislation comparée du Service des Études Juridiques, No. LC 117, février 2003.

[846] *See* above, Part VII.A.6(c).

[847] This article provides as follows:

> "Protection against expulsion
>
> "1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
>
> "2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
>
> "3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
>
> "(a) have resided in the host Member State for the previous 10 years; or
>
> "(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

[848] *See* Part VII.A.6(g). This provision specifies the diseases that may justify expulsion on grounds of public health.

[849] Corrigendum to Directive 2004/38/EC, note 745 above, article 33.

383. Failure to comply with the national law of the territorial State, including its criminal law, is a ground for expulsion according to the legislation of several States. The convicting court may[850] or may not[851] be required to be that of the expelling State. With respect to the substantive criminal standard, the relevant law may: (1) expressly require it to be that of the expelling State;[852] (2) identify specific provisions whose violation provides grounds for expulsion;[853] (3) recognize violations of a foreign State's law,[854] sometimes subject to a comparison with the expelling State's law;[855] or (4) not specify a particular criminal standard, but evaluate or categorize it in terms of the expelling State's law.[856]

384. The national laws of some States do not specify the type of violation or proceeding which can lead to expulsion on this ground.[857] In contrast, the national laws of other States provide for expulsion as a punishment for certain types of behaviour. For example: if the alien has assisted in the smuggling or illegal entry of other aliens (apart from cases of trafficking covered under morality), or if the alien belongs to an organization engaged in such activity,[858] the relevant law may (1) consider this grounds for expulsion;[859] (2) require a criminal sentence to have been passed for grounds to be found;[860] (3)

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[850] Argentina, 2004 Act, articles 29(f)-(g), 62(b); Australia, 1958 Act, articles 201(a), 203(1)(a); Bosnia and Herzegovina, 2003 Law, article 57(1)(h); and Chile, 1975 Decree, articles 64(1), 66.

[851] Argentina, 2004 Act, article 29(c); Australia, 1958 Act, article 201(a)-(c); and Canada, 2001 Act, article 36(1)-(3).

[852] Australia, 1958 Act, article 250(1); Belarus, 1998 Law, articles 14, 28, 1993 Law, article 20(3); Bosnia and Herzegovina, 2003 Law, articles 27(1)(a), 47(1)(a); Japan, 1951 Order, article 5(4), (8), (9)-2; Republic of Korea, 1992 Act, articles 11(1)(2), (1)(8), 46(2), 67(1), 89(1)(5); Poland, 2003 Act No. 1775, article 88(1)(9); and Spain, 2000 Law, article 57(7)-(8).

[853] Australia, 1958 Act, article 203(1)(c); Denmark, 2003 Act, article 22(iv)-(vi); and Germany, 2004 Act, article 53(2).

[854] Columbia, Act, article 89(7); Japan, 1951 Order, article 5(4); and Kenya, 1967 Act, article 3(1)(d).

[855] Canada, 2001 Act, article 36(2)(b)-(c); Russian Federation, 2002 Law No. 115-FZ, articles 7(6), 9(6), 18(9)(6), 1996 Law, articles 26(3), 27(3); and Spain, 2000 Law, article 57(2).

[856] Chile, 1975 Decree, articles 15(3), 16(1), 65(1).

[857] Bosnia and Herzegovina, 2003 Law, articles 27(1)(a), 47(1)(a); and Switzerland, 1931 Federal Law, article 10(4).

[858] Canada, 2001 Act, article 37(1)(b).

[859] Argentina, 2004 Act, article 29(c); Brazil, 1980 Law, articles 124(XII)-(XIII), 127; Germany, 2004 Act, articles 53(3), 54(2); Greece, 2001 Law, article 44(1)(a); Hungary, 2001 Act, article 32(1)(c); Italy, 1998 Decree-Law No. 286, articles 4(3), 8; and Paraguay, 1996 Law, articles 108(2), 111. A State may expressly exempt from expulsion on such grounds certain types of persons such as religious persons or diplomats (Italy, 1998 Decree-Law No. 286, articles 4(3), 8).

[860] Germany, Basic Law, articles 53(3), 54(2); and Greece, 2001 Law, article 44(1)(a).

specify penalties in addition to expulsion;[861] or (4) impute a legal responsibility to the alien but not expressly impose expulsion.[862] In cases not involving the smuggling of illegal entrants, the relevant legislation may specify that the expulsion shall take place upon fulfilment of the sentence imposed.[863] This ground for expulsion may be imputed to the alien's entire family.[864]

385. Where the legislation permits expulsion to follow an alien's sentencing,[865] a threshold in terms of the severity of punishment may have to be met.[866] The expulsion in such cases may (1) be imposed as an independent or combined penalty;[867] (2) discharge, replace or occur during a custodial or other sentence;[868]

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[861] Brazil, 1980 Law, articles 124(XII)-(XIII), 125-27; and Paraguay, 1996 Law, articles 108(2), 111.

[862] Belarus, 1998 Law, article 26.

[863] Chile, 1975 Decree, articles 69, 87; France, Code, articles L621-1, L624-2, L624-3; Italy, 1998 Decree-Law No. 286, article 16(4), (8); Paraguay, 1996 Law, articles 108(2), 111; and United States, INA, section 276(c).

[864] Brazil, 1980 Law, article 26(2).

[865] Argentina, 2004 Act, article 64(a)-(b); Australia, 1958 Act, articles 200, 201(a)-(c); Austria, 2005 Act, article 3.54(2)(2); Bosnia and Herzegovina, 2003 Law, articles 47(4), 57(1)(h); Canada, 2001 Act, article 36(1)(a)-(c); China, 1992 Provisions, articles I(i), II(i)-(ii); Columbia, Act, article 89(1); Denmark, 2003 Act, article 22; Finland, 2004 Act, section 149(2); France, Code, article L521-2; Greece, 2001 Law, article 44(1)(a); Japan, 1951 Order, articles 5(4), 24(4)(g), (i); Kenya, 1967 Act, article 3(1)(d); Republic of Korea, 1992 Act, article 46(1)(11); Norway, 1988 Act, section 29(b)-(c); Panama, 1960 Decree-Law, article 37(f); Paraguay, 1996 Law, articles 6, 7(3), 81(5); Portugal, 1998 Decree-Law, article 25(2)(c); Spain, 2000 Law, article 57(1); Sweden, 1989 Act, sections 4.2(3), 4.7; Switzerland, Penal Code, article 55(1); and United States, INA, section 101(a)(48), (a)(50)(f)(7). This standard may include a requirement that the crime be of a specified type or quality, such as money-laundering or a premeditated or intentional crime (Argentina, 2004 Act, articles 29(c), 62(b); Brazil, 1981 Decree, article 101, 1980 Law, article 67; Germany, 2004 Act, articles 53(1)-(2), 54(1); Hungary, 2001 Act, article 32(1)(e); Japan, 1951 Order, articles 5(9)-2, 24(4)(f), (4)-2); Nigeria, 1963 Act, article 18(1)(c); Poland, 2003 Act No. 1775, article 88(1)(9); and United States, INA, sections 212(a)(2), 237(a)(2), 238(c)).

[866] Argentina, 2004 Act, articles 29(c), 62(b); Australia, 1958 Act, article 201(a)-(c); Austria, 2005 Act, article 3.54(2)(2); Bosnia and Herzegovina, 2003 Law, articles 47(4), 57(1)(h); Canada, 2001 Act, article 36(1)(b)-(c); Denmark, 2003 Act, article 22; Finland, 2004 Act, section 149(2); France, Code, article L521-2; Germany, 2004 Act, articles 53(1)-(2), 54(1)-(2); Greece, 2001 Law, article 44(1)(a); Hungary, 2001 Act, article 32(1)(e); Japan, 1951 Order, articles 5(4), 24(4)(g), (i); Norway, 1988 Act, section 29(b)-(c); Paraguay, 1996 Law, articles 6(4), 7(3), 81(5); Portugal, 1998 Decree-Law, article 25(2)(c); Spain, 2000 Law, article 57(2), (7); Sweden, 1989 Act, section 4.7; Switzerland, Penal Code, article 55(1); and United States, INA, section 101(a)(50)(f)(7). When expulsion may follow a sentence passed in the expelling State, the test of severity may look to the sentencing court's pronouncement (Australia, 1958 Act, article 201(a)-(c); and Bosnia and Herzegovina, 2003 Law, article 57(1)(h)). Where a foreign court has passed the sentence, the relevant law may consider the sentence which the expelling State would have applied to the violation (Argentina, 2004 Act, articles 29(c), 62(b); Canada, 2001 Act, article 36(1)(b)-(c); Hungary, 2001 Act, article 32(1)(e); Norway, 1988 Act, section 29(b)-(c); Paraguay, 1996 Law, article 7(3); and Spain, 2000 Law, article 57(2)).

[867] China, 1978 Law, article 35, 1998 Provisions, article 336; 1992 Provisions, article I(i), and Republic of Korea, 1992 Act, article 46(1).

[868] Argentina, 2004 Act, article 64(a)-(c); Italy, 1998 Decree-Law No. 286, article 16(1), (4), (8)-(9); Japan, 1951 Order, articles 62(3)-(5), 63; Republic of Korea, 1992 Act, article 85(2); Spain, 2000 Law, articles 53, 57(1), (7); and Switzerland, Penal Code, article 55(2)-(4).

(3) be ordered to occur after the alien fulfils a custodial or other sentence[869] or completes some other form of detention involving a potential or actual criminal prosecution;[870] or (4) be ordered for the express reason that the alien has received a sentence which does not include expulsion, or when the sentence was not otherwise followed by expulsion.[871]

386. According to the relevant national legislation, grounds under this heading may also be found if the alien (1) is convicted or otherwise found guilty,[872] charged,[873] accused,[874] wanted,[875] being prosecuted[876] or caught in a violation;[877] (2) has[878] or is suspected[879] of having committed a violation;

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[869] Argentina, 2004 Act, article 62(b); Bosnia and Herzegovina, 2003 Law, article 47(4); Chile, 1975 Decree, article 57; China, 1992 Provisions, articles II(ii), VI(i), 1998 Provisions, article 336; France, Code, article L541-1; Honduras, 2003 Act, article 89(1); Japan, 1951 Order, articles 62(3), 63(2); Republic of Korea, 1992 Act, articles 84(2), 85(1)-(2), 86(2); Paraguay, 1996 Law, articles 81(5), 111; Poland, 2003 Act No. 1775, article 8(1)(9); Spain, 2000 Law, article 57(8); Switzerland, Penal Code, article 55(4); and United States, INA, section 238(a)(1).

[870] Australia, 1958 Act, article 250(3)-(5); and Belarus, 1998 Law, article 14.

[871] Bosnia and Herzegovina, 2003 Law, articles 47(4), 57(1)(g)-(h); and Columbia, Act, article 89(1).

[872] Australia, 1958 Act, articles 200, 203(1); Brazil, 1980 Law, article 66; Columbia, Act, article 89(7); Honduras, 2003 Act, article 89(1); Paraguay, 1996 Law, article 6(5); and South Africa, 2002 Act, article 29(1)(b). This standard may include a requirement that the crime be of a specified type or quality, such as money-laundering or a premeditated or intentional crime (Austria, 2005 Act, article 3.54(2); Bosnia and Herzegovina, 2003 Law, article 57(1)(g); Canada, 2001 Act, article 36(1)(a)-(b), (2)(a)-(b); Chile, 1975 Decree, articles 15(3), 16(1), 63(1), 64(1), 65(1)-(2), 66; France, Code, articles L511-1(5), L541-1; Greece, 2001 Law, article 44(1)(a); Russian Federation, 2002 Law No. 115-FZ, articles 7(5), 9(5), 18(9)(5); Spain, 2000 Law, article 57(2), (7)-(8); Switzerland, 1931 Federal Law, article 10(1); and United States, INA, section 101(a)(50)(f)(8)). The possibility of appeal or review may affect the conviction's ability to serve as grounds for expulsion. (Compare Austria, 2005 Act, article 3.54(2)(1), which permits expulsion where the judgment is not final, with Nigeria, 1963 Act, article 21(2), which does not allow deportation pursuant to an expulsion recommendation until all avenues of appeal against the conviction are closed.)

[873] Austria, 2005 Act, article 3.54(2)(2); and Chile, 1975 Decree, articles 15(3), 16(1), 64(1), 65(1), 66.

[874] Panama, 1960 Decree-Law, article 37(f).

[875] South Africa, 2002 Act, article 29(1)(b).

[876] Brazil, 1980 Law, article 66.

[877] Austria, 2005 Act, article 3.54(2)(2); and Japan, 1951 Order, article 5(4)(8).

[878] China, 1978 Law, article 35; Republic of Korea, 1992 Act, articles 67(1), 89(1)(5); and United States, INA, section 212(a)(2)(A). The relevant legislation may expressly include an act committed outside of the State's territory (Belarus, 1998 Law, article 28).

[879] Such an act can be of either a specified type (Belarus, 1998 Law, article 14; Republic of Korea, 1992 Act, article 11(1)(2), (1)(8); and Portugal, 1998 Decree-Law, article 25(2)(d)) or an unspecified type (Australia, 1958 Act, article 250(1); and Belarus, 1993 Law, article 20(3)).

(3) has a criminal record;[880] (4) displays[881] or is dedicated to,[882] engaged in,[883] intending[884] or predisposed[885] to criminal acts and behaviour; (5) has been expelled from the State or another State pursuant to certain criminal provisions;[886] or (6) is a member of an organization deemed to be engaged in criminal activities.[887]

387. The expulsion of an alien on this ground may depend on (1) whether the alien was a citizen at the time of the act's commission,[888] has been granted permission to stay or reside in the State's territory,[889] has been pardoned or had the relevant conviction quashed[890] or has been rehabilitated;[891] (2) the length of the alien's stay in the State's territory at the time the act was committed;[892] (3) whether the alien's nationality is granted special treatment by the expelling State's law;[893] (4) whether the alien's State has a relevant special relationship with the expelling State;[894] or (5) the alien's method of arrival or location at the relevant time.[895]

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[880] Argentina, 2004 Act, article 29(c); Germany, 2004 Act, article 53(1); Paraguay, 1996 Law, article 6(5); Russian Federation, 2002 Law No. 115-FZ, articles 7(6), 9(6), 18(9)(6), 1996 Law, articles 26(3), 27(3); and United States, INA, section 212(a)(2)(B).

[881] Argentina, 2004 Act, article 62(b).

[882] Chile, 1975 Decree, articles 15(2), 17, 63(2), 65(1), (3).

[883] Honduras, 2003 Act, article 89(2); Panama, 1960 Decree-Law, article 37(b); and Sweden, 1989 Act, section 3.4(2).

[884] Portugal, 1998 Decree-Law, article 25(2)(e); and Sweden, 1989 Act, sections 4.2(3), 4.7, 4.11.

[885] Paraguay, 1996 Law, article 6(7).

[886] Japan, 1951 Order, article 5(5)-2.

[887] Bosnia and Herzegovina, 2003 Law, article 57(1)(g); Canada, 2001 Act, article 37(1)-(2); and South Africa, 2002 Act, article 29(1)(e).

[888] Australia, 1958 Act, articles 201(a)-(b), 203(1)(a)-(b), (7), 204(1)-(2), 250(1)-(3); and Brazil, 1980 Law, articles 74-75, 76(I).

[889] Austria, 2005 Act, article 3.54(2); Australia, 1958 Act, articles 201(b), 204; Denmark, 2003 Act, article 22; Japan, 1951 Order, articles 5(9)-2, 24(4)-2; Paraguay, 1996 Law, article 6(4)-(5); Spain, 2000 Law, article 57(5), (7); Sweden, 1989 Act, section 4.2(3); and United States, INA, section 238(b).

[890] Canada, 2001 Act, article 36(3)(b).

[891] Canada, 2001 Act, article 36(3)(c).

[892] Austria, 2005 Act, article 3.54(2)(2); Australia, 1958 Act, article 201(b); Denmark, 2003 Act, article 22; Paraguay, 1996 Law, article 81(5); and Sweden, 1989 Act, section 4.2(3). The period of the alien's imprisonment may affect the calculation of this length (Australia, 1958 Act, article 204).

[893] Australia, 1958 Act, article 201(b)(ii).

[894] South Africa, 2002 Act, article 29(1)(b).

[895] Australia, 1958 Act, article 250(1).

388. The national legislation may expressly declare irrelevant the timing of the alien's conviction relative to the law's entry into force,[896] and may[897] or may not[898] consider as grounds for inadmissibility the fact that the alien's entry was achieved with the help of a person or organization engaged in illegal activity.

389. Numerous cases in national courts have involved expulsions of aliens convicted[899] of committing serious crimes.[900]

390. Thus, State practice would appear to recognize the validity of this ground for expulsion. However, divergent State practice with respect to some elements of this ground may require further consideration in terms of (1) a sufficiently serious violation of national law; (2) the type of unlawful

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[896] Australia, 1958 Act, articles 201(a), 203(1)(a).

[897] Australia, 1958 Act, article 250(1)(a).

[898] Canada, 2001 Act, article 37(2)(b).

[899] In 1933, the Supreme Court of Canada was requested to rule on whether an individual who had served out their entire prison term or received a pardon (royal prerogative of mercy) could be declared a prohibited or undesirable person and expelled on the basis of said conviction. The Court held that the fulfilment of punishment for the commission of a criminal did not foreclose the possibility of being deported in a subsequent administrative proceeding. *In the Matter of a Reference as to the Effect of the Exercise by His Excellency the Governor General of the Royal Prerogative of Mercy upon Deportation Proceedings,* Reference to the Supreme Court of Canada, 15 and 29 March 1933, *Annual Digest and Reports of Public International Law Cases*, 1933 and 1934, H. Lauterpacht (ed.), Case No. 135, pp. 328-330. See also Sentenza N. 58, Italy, La Corte Costituzionale, 1995 (declaring unconstitutional a provision for expelling aliens having served a term of imprisonment for a criminal conviction, absent a finding of continued dangerousness); Sentenza No. 62, Italy, La Corte Costituzionale, 24 February 1994 (upholding the constitutionality of suspending a prison sentence of less than three years in favor for expelling a convicted alien).

[900] *Ceskovic v. Minister for Immigration and Ethnic Affairs,* Federal Court, General Division, 13 November 1979, *International Law Reports*, volume 73, E. Lauterpacht (ed.), C.J. Greenwood, pp. 627-634 (convicted for crimes of violence including malicious shooting with intent to do grievous bodily harm); *Deportation to U. Case,* Federal Republic of Germany, Superior Administrative Court (Oberverwaltungsgericht) of Rhineland-Palatinate, Federal Republic of Germany, 16 May 1972, *International Law Reports*, volume 73, E. Lauterpacht, C.J. Greenwood (eds.), pp. 613-617 (convicted of manslaughter); *Urban v. Minister of the Interior,* Supreme Court of South Africa, Cape Provincial Division, 30 April 1953, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 340-342; *Homeless Alien (Germany) Case*, note 702 above, pp. 507-508 ("A foreign national who has been found guilty of a criminal offence is, as a general rule, expelled to his home State."). In *Leocal v. Ashcroft*, the Supreme Court of the United States ruled that State driving under the influence offenses similar to the one in Florida, which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle, do not qualify as a "crime of violence" under a deportation statute (*Leocal v. Ashcroft, Attorney General, et al.*, United States Court of Appeals, Eleventh Circuit, 9 November 2004, No. 03-5830). In some cases, national courts have considered convictions for serious crimes committed outside of the territorial State a sufficient ground for sustaining an order expulsion, based on considerations of public order. *See* Part VII.A.6(c).

conduct in terms of planning, preparing, inciting, conspiring or committing such a violation;[901] (3) the evidentiary requirement for such unlawful conduct ranging from mere suspicion to a final judgment;[902] (4) the right of the alien to have the opportunity to negate the allegations of unlawful conduct;[903] and (5) the necessity of separate proceedings to determine the violation of national law and the expulsion of the alien.[904]

391. Conviction for a criminal offence may also, under certain conditions, be a factor justifying an expulsion on grounds of public order or national security discussed in Parts VII.A.6(c) and (d).

(g) Public health and safety

392. Public health and safety may be considered as a relevant factor in determining the expulsion of an alien on the basis of the public order or welfare of a State (*ordre public*) rather than as a separate ground under international law.

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[901] "It may expel from its territory one who commits acts that are forbidden by its laws, or who may be fairly regarded as a prospective violator of them, or who proclaims his opposition to them, regardless of the view of his conduct or anticipated conduct that is entertained by his own State." Charles Cheney Hyde, *International Law; Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 234 (citation omitted).

[902] "Perhaps the most frequent cause of expulsion is conviction for crime. All countries reserve this right, although it is resorted to usually in flagrant cases only, where the presence of the alien may compromise the public safety. Where the public necessity is sufficiently great, especially where the crime is of a political nature, expulsion may take place on executive order without a judicial conviction." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 52. "The power of expulsion or deportation may be exercised if an alien's conduct or activities after being admitted into the state violate certain basic rules. Such conduct or activities include … 2. Conviction of a crime of a serious nature …" Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 90-91.

[903] "To minimize the harsh and arbitrary use of the power, numerous treaties between states stipulate… that the person expelled shall have an opportunity to clear himself of the charges against him…" Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 56.

[904] "It has been held that the right to prosecute criminally and the right to deport or expel are inconsistent as concurrent rights; the proceedings must be successive." Ibid., p. 52 (citing *U.S. v. Lavoie*, 182 Fed. Rep. 943; and referring also to the case of Mgr. Montagnini in France, 14 Revue Générale de droit international public (1907), 175; J. Challamel in Journal des Debats, March 12, 1907, reprinted in 34 Clunet (1907), pp. 331-334).

393. Public health and safety have been recognized as a valid ground for the expulsion of aliens in the European Union, national legislation[905] and literature.[906] A State may have fairly broad discretion in determining whether there are public health and safety grounds for the expulsion of an alien.[907]

394. In recent years, the Acquired Immune Deficiency Syndrome (AIDS) epidemic has raised new issues with respect to the expulsion of aliens based on considerations of public health. It has been noted that the international movement of persons has contributed to the spread of the global epidemic.[908] The fact that a person is infected with HIV/AIDS may be a valid public heath concern for the refusal to admit aliens.[909] The extent to which these travel restrictions are justified has been questioned.

> "The World Health Organization has long maintained that HIV/AIDS constitutes no threat to public health. HIV infection is not like certain psychopathic conditions in which the

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[905] "Very commonly, an alien's deportation may be ordered in the interests of public health…" Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, pp. 467-468 (citing Belgium, Law of 15 December 1980, article 7(6); Canada, Immigration Act, S.C.1976-77, cap. 52, as amended, section 32; Federal Republic of Germany, Auslandergesetz (Aliens Law) of 28 April 1965, BGB1. 1965 I, 353, article 10; Luxembourg, Law of 28 March 1972, article 9; Nigeria, 1963 Act, article 17; Portugal, Law of 28 March 1972, article 9; Portugal, Decree-Law 264-B181, article 42).

[906] "The power of expulsion or deportation may be exercised if an alien's conduct or activities after being admitted into the state violate certain basic rules. Such conduct or activities include: … 3. Engaging in activities which … are prejudicial to … public health …" Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 90-91.

[907] "In the *Hockbaum* case, decided in 1934 by the Upper Silesian Arbitral Tribunal, it was held that when expulsion is based on grounds of public safety the Tribunal will not, as a rule, review the decision of the competent state authorities: *Decisions of the Tribunal,* vol. 5, No. 1, p. 20ff; AD, 7 (1933-34), No. 134; ZöV, 5 (1935), pp. 653-5. See also *Re Rizzo and Others (No 2),* ILR, 22 (1955), pp 500, 507; *Agee v. UK* (1976), *Decisions and Reports of the European Commission of Human Rights, 7,* p 164; *R v. Secretary of State for Home Affairs, ex parte Hosenball* [1977] 3 All ER 452." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 944, n.16.

[908] "For with the exception of the relatively small contribution of blood and blood products to the global epidemic, HIV has largely been spread through the movement of people." See Mary Haour-Knipe and Richard Rector (eds.), *Crossing Borders: Migration, Ethnicity and AIDS,* London/Bristol, Taylor & Francis, 1996, p. viii.

[909] "A State may require a person seeking entry into its territory to be in possession of a certificate of medical fitness or a certificate of inoculation against specified contagious diseases. That document must comply with the national regulations of the State of entry, which are usually based on international health regulations of a general or regional health organization. Such regulations apply in particular to all travellers or travellers arriving from specific regions, and are intended to prevent the spread of those diseases. … The World Health Organization regulations provide for quarantine action which member nations may take with respect to four diseases, namely, cholera, the plague, yellow fever, and small pox. … To this list of communicable diseases, 'AIDS' (Acquired Immune Deficiency Syndrome) has now been added." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 64.

> afflicted are *unable* to control their behaviour and for that reason constitute a potential danger to other members of society. Similarly, HIV infection is not like infectious conditions, such as tuberculosis, in which regardless of the best efforts of the person affected, others are likely to be put at risk, for example, through airborne transmission of bacteria. Although there is no hard evidence to suggest that HIV/AIDS-related costs justify travel restrictions, the perceptions among legislators and administrators are to the contrary; barriers to travel appear to be increasing, not only with respect to those seeking to migrate permanently, but also for those travelling to work or to study.
>
> "In this context, HIV screening appears to serve two functions, neither of which is dictated by health or economics. From the perspective of an uninformed and apprehensive public, for whom elected representatives want to be seen to be 'doing something', screening seems an easy enough and necessary way by which to raise a barrier to the spread of disease and to protect the public purse. In fact, its limitations with respect to the prevention of transmission of HIV are common knowledge, including the 'window of uncertainty' between possible infection and the development of antibodies, and the notorious reluctance on the part of states to test citizens returning from abroad, even from 'high risk' areas. But there are other problems with any screening programme, including the suspicion engendered, the temptation to report inexact medical histories, or to breach confidentiality, and the practical difficulties of follow-up where appropriate. As one commentator has remarked, countries requiring HIV testing commonly accept refugees for resettlement having medical conditions likely to incur public expense far in excess of anything an HIV patient is likely to incur, and this rather negates the argument for screening on economic grounds."[910]

395. The question arises as to whether an alien with this illness can be expelled on public health and safety grounds. It should be noted that the discretion of a State with respect to immigration controls for reasons of public health may be broader for the exclusion of aliens than for the expulsion of aliens.[911] This question may require consideration of the relevant human rights of the alien.[912] The

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[910] Guy S. Goodwin-Gill, "AIDS and HIV, Migrants and Refugees: International Legal and Human Rights Dimensions", *in* Mary Haour-Knipe and Richard Rector (eds.), *Crossing Borders: Migration, Ethnicity and AIDS*, London/Bristol, Taylor & Francis, 1996, pp. 50-69, at pp. 63-64 (citations omitted, emphasis in original).

[911] "States also have wide discretion in establishing grounds for deportation or expulsion of those who have made an entry into national territory. As a matter of practice, the grounds for expulsion are typically more limited than grounds for barring entry. Contracting a contagious disease while on national territory is less likely to be *per se* a ground for deportation, for example, even though the same illness might well have blocked initial admission if the disease had developed before entry." David A. Martin, "The Authority and Responsibility of States" in Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 31-45, at p. 34.

[912] See Stephanie Palmer, "AIDS, Expulsion and Article 3 of the European Convention on Human Rights", *European Human Rights Law Review*, vol. 5, 2005, pp. 533-540; Guy S. Goodwin-Gill, "AIDS and HIV, Migrants and Refugees: International Legal and Human Rights Dimensions", *in* Mary Haour-Knipe and Richard Rector (eds.), *Crossing Borders: Migration, Ethnicity and AIDS*, London/Bristol, Taylor & Francis, 1996, pp. 50-69.

relevant criteria would appear to include the state of the illness of the alien and the medical conditions or the possibility of treatment in the State of nationality to which the alien would presumably be expelled.[913]

396. Within the European Union, public health considerations are recognized as a valid ground for the expulsion of Union Citizens and their family members. Public health grounds are referred to in article 27 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, reproduced in Part VII.A.6(c). Article 29 of the same Directive provides indications concerning the diseases which may justify an expulsion for reasons of public health. It is worth noting that the diseases occurring after a three-month period from the date of the arrival of the individual in the territory of the host State may not justify an expulsion. Article 29 provides as follows:

> "1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.
>
> "2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.
>
> "3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine."

397. Attention may also be drawn the draft Code of Crimes Against the Peace and Security of Mankind (1996), which addressed deportations as a crime against humanity in article 18(g).[914] The

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[913] "An important question arises under human rights law whether returning persons to countries where they may not have access to adequate health services constitutes inhuman or degrading treatment. These issues have been examined under the European Court of Human Rights in a variety of cases. More often than not, return has been allowed. ... The benchmarks would thus appear to be the state of the illness and the conditions in the country of origin. ... Finally, cases in which non-citizens contest expulsion based on a claim of illness and lack of facilities in the country of origin are likely to succeed only under special circumstances." Peter Van Krieken, "Health and Migration: The Human Rights and Legal Context" in Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 289-302, at pp. 299, 301 and 302 (citation omitted).

[914] This draft provision reads as follows: "A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: ... (g) Arbitrary deportation or forcible transfer of population." Draft Code of Crimes against the Peace and Security of Mankind (1996), article 18, paragraph (g), *Yearbook of the International Law Commission*, 1996, vol. II, Part Two, A/51/10, p. 47.

commentary to this provision refers to "public health or well being" as a relevant factor to be taken into account in assessing the arbitrary character of a deportation.[915]

398. The national laws of several States recognize public health considerations as a valid ground for the expulsion of aliens. A State may expel or refuse entry to an alien who suffers from (1) a disease that is listed or enumerated,[916] hereditary (or a family disease),[917] incapacitating,[918] chronic,[919] epidemic, infectious, contagious or communicable,[920] or makes the alien's presence undesirable for medical reasons;[921] (2) HIV/AIDS,[922] tuberculosis,[923] leprosy[924] or venereal diseases;[925] (3) physical defects;[926] (4) a mental illness or handicap[927] or retardation;[928] (5) alcoholism, drug addiction or

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[915] "The term 'arbitrary' is used to exclude the acts when committed for legitimate reasons, such as public health or well being, in a manner consistent with international law." Draft Code of Crimes against the Peace and Security of Mankind (1996), article 18, commentary (13), *Yearbook of the International Law Commission*, 1996, vol. II, Part Two, A/51/10, p. 49.

[916] Belarus, 1998 Law, articles 14-15, 20; Chile, 1975 Decree, articles 15(5), 64(4), 65(1), 66; China, 1986 Rules, articles 7(4), 20; Greece, 2001 Law, article 44(1)(c); Japan, 1951 Order, articles 5(1), 7(4); Russian Federation, 2002 Law No. 115-FZ, articles 7(13), 9(13), 18(9); and South Africa, 2002 Act, article 29(1)(a).

[917] Brazil, 1981 Decree, article 52(II); and Paraguay, 1996 Law, articles 6(3), 7(2).

[918] Brazil, 1981 Decree, article 52(III).

[919] Paraguay, 1996 Law, articles 6(3), 7(2).

[920] China, 1986 Rules, articles 7(4), 20; Japan, 1951 Order, articles 5(1), 7(4); Republic of Korea, 1992 Act, articles 11(1)(1), (1)(8), 46(1)(2); Panama, 1960 Decree-Law, article 37(d); Paraguay, 1996 Law, articles 6(1), 7(1); Russian Federation, 2002 Law No. 115-FZ, articles 7(13), 9(13), 18(9); South Africa, 2002 Act, article 29(1)(a); and United States, INA, sections 212(a)(1)(A), 232(a).

[921] Kenya, 1967 Act, article 3(1)(c)(ii); and Nigeria, 1963 Act, article 50(d).

[922] China, 1986 Rules, articles 7(4), 20; Russian Federation, 2002 Law No. 115-FZ, articles 7(13), 9(13), 18(9); and United States, INA, sections 212(a)(1)(A)(i), (g)(1), 232(a).

[923] China, 1986 Rules, articles 7(4), 20.

[924] China, 1986 Rules, articles 7(4), 20.

[925] China, 1986 Rules, articles 7(4), 20.

[926] Brazil, 1981 Decree, article 52(IV). A State may consider as relevant only those physical defects which pose a threat to ordre public (United States, INA, sections 212(a)(1)(A)(iii), (g)(3), 232(a)).

[927] This can involve either any mental illness or handicap (Brazil, 1981 Decree, article 52(I); China, 1986 Rules, articles 7(4), 20; Kenya, 1967 Act, article 3(1)(b); Republic of Korea, 1992 Act, articles 11(1)(5), (1)(8), 46(1)(2); Nigeria, 1963 Act, articles 18(1)(b), 39(1)-(2); Panama, 1960 Decree-Law, article 37(e)), or one which: (1) prevents discernment of right and wrong (Japan, 1951 Order, article 5(2)); (2) causes altered behaviour (Paraguay, 1996 Law, articles 6(2), 7(1)); (3) is otherwise debilitating (Paraguay, 1996 Law, articles 6(3), 7(2)); or (4) affects or threatens ordre public (Switzerland, 1931 Federal Law, article 10(1)(c), (2); and United States, INA, sections 212(a)(1)(A)(iii), (g)(3), 232(a)).

[928] Paraguay, 1996 Law, article 6(3), 7(2).

drug abuse;[929] (6) old age;[930] or (7) a grave state of health.[931] A State may do likewise if an alien: (1) threatens the health of the public[932] or of the State's animals;[933] (2) comes from a region of epidemiological concern;[934] (3) fails specified health standards or conditions;[935] (4) is likely to place excessive demands on the State's health services;[936] or (5) fails to present vaccination records.[937]

399. The alien may be required to undergo a medical examination[938] (which may involve detention)[939] or to have sufficient funds to cover the alien's medical costs.[940] The expulsion of an alien on this ground may be affected by (1) the alien's compliance with the State's health authorities;[941] or (2) a special arrangement or relationship existing between the alien's State and the expelling State.[942] Family connections to nationals of the State may[943] or may not[944] affect the alien's status under this

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[929] Brazil, 1981 Decree, article 52(V); Republic of Korea, 1992 Act, articles 11(1)(1), (1)(8), 46(1)(2); Paraguay, 1996 Law, articles 6(6), 7(4); Russian Federation, 2002 Law No. 115-FZ, articles 7(13), 9(13), 18(9); and United States, INA, sections 101(a)(50)(f)(1), 212(a)(1)(A)(iv), 232(a), 237(a)(2)(B)(ii).

[930] Paraguay, 1996 Law, article 35(b).

[931] Paraguay, 1996 Law, article 35(b); compare France, Code, article L521-3(5), which does not permit expulsion when doing so would have consequences of an exceptional gravity for the alien's health.

[932] Belarus, 1998 Law, articles 14-15, 20, 1993 Law, articles 20(2), 25(1); Brazil, 1981 Decree, article 101, 1980 Law, article 67; Canada, 2001 Act, article 38(1)(a); Czech Republic, 1999 Act, section 9(1); Denmark, 2003 Act, article 25(ii); Finland, 2004 Act, sections 11(1)(5), 168(1)-(2); Germany, 2004 Act, article 55(2)(5); Honduras, 2003 Act, article 89(3); Italy, 1998 Law No. 40, article 45(2)(b); Republic of Korea, 1992 Act, articles 11(1)(1), (1)(8), 46(1)(2); Lithuania, 2004 Law, article 7(5); Madagascar, 1962 Law, article 13; Panama, 1960 Decree-Law, articles 18, 36 (as amended by Act No. 6 (1980), para. 10), 38; Poland, 2003 Act No. 1775, article 21(1)(5); and Russian Federation, 1996 Law, articles 25.10, 27.

[933] Belarus, 1998 Law, article 20.

[934] Belarus, 1998 Law, article 20; and Italy, 1996 Decree-Law, article 4(2).

[935] Brazil, 1980 Law, articles 7(V), 26.

[936] Canada, 2001 Act, article 38(1)(c), (2).

[937] United States, INA, sections 212(a)(1)(A)(ii), (B), (g)(2), 232(a).

[938] Belarus, 1998 Law, article 20; Japan, 1951 Order, articles 7(1), 9; Kenya, 1967 Act, article 3(1)(c)(i); Nigeria, 1963 Act, article 50(d); and United States, INA, sections 232(a), 240(c)(1)(B).

[939] United States, INA, section 232(a).

[940] Hungary, 2001 Act, article 4(1)(d); and Lithuania, 2004 Law, article 7(3).

[941] Greece, 2001 Law, article 44(1)(c).

[942] Finland, 2004 Act, section 168(1)-(2); and Italy, 1998 Law No. 40, article 45(2)(b).

[943] Canada, 2001 Act, article 38(2); Paraguay, 1996 Law, articles 7, 35(b); and United States, INA, section 212(a)(1)(B), (g)(1).

[944] Panama, 1960 Decree-Law, article 38.

heading, while grounds found under this heading may be extended to the alien's entire family.[945] This heading may expressly apply to aliens with transitory status.[946]

400. It should be noted that some national courts have held that aliens suffering from severe medical conditions cannot be expelled where such an expulsion would constitute a violation of human rights as discussed in Part VII.C.3(c).

(h) Morality

401. Morality has been recognized as a valid ground for the expulsion of aliens in treaty law, State practice[947] and literature.[948]

402. The European Convention on Establishment provides in article 3, paragraph 1, as follows:

> "Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against ordre public or morality."

403. Expulsion on grounds of morality is contemplated in the national laws of several States. Thus, a State may expel an alien who has furthered, promoted or profited from prostitution or other sexual exploitation[949] or from human trafficking.[950] A State may do likewise if the alien (1) has engaged in or

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[945] Brazil, 1980 Law, article 26(2).

[946] Panama, 1960 Decree-Law, article 36 (as amended by Act No. 6 (1980), para. 10); and United States, INA, section 232(a).

[947] "Very commonly, an alien's deportation may be ordered… on account of the alien's… immoral conduct (including prostitution and use of narcotics)…" Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, pp. 467-468 (citing *inter alia* Denmark, Aliens Act No. 226 of 8 June 1983, Article 25(2); Nigeria, 1963 Act, section 17(l)(g)-(h)).

[948] "The power of expulsion or deportation may be exercised if an alien's conduct or activities after being admitted into the state violate certain basic rules. Such conduct or activities include: … 3. Engaging in activities which … are prejudicial to … morality …" Louis P. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 90-91.

[949] Argentina, 2004 Act, article 29(h); Greece, 2001 Law, article 44(1)(a); Italy, 1998 Decree-Law No. 286, articles 4(3), 8; Japan, 1951 Order, articles 5(7), 24(4)(j); Kenya, 1967 Act, article 3(1)(e); Nigeria, 1963 Act, article 18(1)(h), (3)(a), (e)-(g); Panama, 1960 Decree-Law, article 37(a); Paraguay, 1996 Law, article 6(6); and United States, INA, sections 212(a)(2)(D)(ii), 278.

[950] Argentina, 2004 Act, article 29(h); Bosnia and Herzegovina, 2003 Law, article 57(1)(g); Chile, 1975 Decree, articles 15(2), 17, 63(2), 65(1)-(3); Hungary, 2001 Act, article 46(2); Japan, 1951 Order, articles 2(7), 5(7)-2, 24(4)(c); and United States, INA, sections 212(a)(2)(D)(ii), (H)(i), 278.

is prone to prostitution;[951] (2) is otherwise involved in forbidden sexual behaviour[952] or sexual crimes;[953] (3) has trafficked in human organs;[954] (4) has profited from,[955] smuggled,[956] traded or trafficked in,[957] produced,[958] possessed[959] or otherwise been involved with[960] drugs such as narcotics or other psychotropic or psychogenic substances; (5) has abducted minors or otherwise involved them in illicit activities;[961] (6) has committed crimes of domestic violence;[962] or (7) has been a gambler or derived significant income from gambling.[963]

404. According to the legislation of some States, expulsion on grounds of morality may apply to an alien who is a member of an organization that engages in human trafficking[964] or drugs;[965] harms or

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[951] Austria, 2005 Act, article 3.53(2)(3); China, 1986 Rules, article 7(3); Japan, 1951 Order, articles 5(7), 24(4)(j), 62(4); Kenya, 1967 Act, article 3(1)(e); Nigeria, 1963 Act, article 18(1)(g), (3)(g); Panama, 1960 Decree-Law, article 37(a); Paraguay, 1996 Law, article 6(6); and United States, INA, section 212(a)(2)(D)(i).

[952] Italy, 1998 Decree-Law No. 286, articles 4(3), 8.

[953] Greece, 2001 Law, article 44(1)(a).

[954] Paraguay, 1996 Law, article 6(6).

[955] Paraguay, 1996 Law, article 6(6).

[956] Bosnia and Herzegovina, 2003 Law, articles 27(1)(b), 47(1)(b); and Hungary, 2001 Act, article 32(1)(b).

[957] Bosnia and Herzegovina, 2003 Law, article 57(1)(g); Chile, 1975 Decree, articles 15(2), 17, 63(2), 65(1)-(3); China, 1986 Rules, article 7(3); Germany, 2004 Act, article 54(3); Greece, 2001 Law, article 44(1)(a); Hungary, 2001 Act, article 46(2); Panama, 1960 Decree-Law, article 37(a); Paraguay, 1996 Law, article 6(6); South Africa, 2002 Act, article 29(1)(b); and United States, INA, section 212(a)(2)(C).

[958] Bosnia and Herzegovina, 2003 Law, articles 27(1)(b), 47(1)(b); Germany, 2004 Act, article 54(3); and Hungary, 2001 Act, article 32(1)(b).

[959] Bosnia and Herzegovina, 2003 Law, articles 27(1)(b), 47(1)(b); and Japan, 1951 Order, article 5(6).

[960] Denmark, 2003 Act, article 22(iv); Germany, 2004 Act, article 53(2); Italy, 1998 Decree-Law No. 286, articles 4(3), 8; Japan, 1951 Order, articles 5(5), 24(4)(h); and United States, INA, sections 212(a)(2)(A)(i)(II), (h), 237(a)(2)(B).

[961] Greece, 2001 Law, article 44(1)(a); Italy, 1998 Decree-Law No. 286, articles 4(3), 8; Japan, 1951 Order, article 2(7)(b)-(c); Nigeria, 1963 Act, article 18(1)(h)(ii)-(iv), (3)(b)-(d), (f); and United States, INA, section 212(a)(10)(C). The United States may exempt a foreign government official from the application of this ground upon the discretionary decision of the U.S. Secretary of State, or if the child is located in a State Party to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980 (United States, INA, section 212(a)(10)(C)(iii)(II)-(III)).

[962] France, Code, article L541-4; and United States, INA, section 237(a)(2)(E).

[963] Panama, 1960 Decree-Law, article 37(b); and United States, INA, section 101(a)(50)(f)(4)-(5).

[964] Bosnia and Herzegovina, 2003 Law, articles 27(1)(c), 47(1)(c); and Canada, 2001 Act, article 37(1)(b).

[965] Bosnia and Herzegovina, 2003 Law, articles 27(1)(b), 47(1)(b); and Hungary, 2001 Act, article 32(1)(b).

threatens national or public morality;[966] commits a crime of moral turpitude;[967] gravely offends morals;[968] engages in immoral conduct[969] or is not of good moral character;[970] operates in a morally inferior environment;[971] is unable to lead a respectable life;[972] or intends to engage in commercialized vice.[973]

405. This ground may be applied either once criminal procedures have begun,[974] or once the alien has committed the relevant act or broken the relevant law.[975] The relevant law may set forth penalties in addition to expulsion,[976] or specify that the expulsion shall occur: (1) after the alien completes a sentence or other detention;[977] or (2) if the alien's sentence did not include expulsion.[978]

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[966] Brazil, 1981 Decree, article 101, 1980 Law, articles 64, 67; Chile, 1975 Decree, articles 15(2), 17, 63(2), 65(1)-(3); Republic of Korea, 1992 Act, article 11(1)(4), (1)(8); Madagascar, 1962 Law, article 13; Panama, 1960 Decree-Law, articles 18, 38; and Russian Federation, 1996 Law, article 25.10.

[967] United States, INA, section 212(a)(2)(A)(i)(I), (ii).

[968] Switzerland, 1949 Regulation, article 16(2).

[969] Panama, 1960 Decree-Law, article 37(a).

[970] United States, INA, section 101(a)(50)(f).

[971] Paraguay, 1996 Law, article 6(7).

[972] Sweden, 1989 Act, section 2.4. In Sweden, an alien may be granted a time-limited residence permit rather than a standard residence permit in view of the alien's anticipated lifestyle (Sweden, 1989 Act, section 2.4b).

[973] United States, INA, section 212(a)(2)(D)(iii).

[974] Argentina, 2004 Act, article 29(h); Bosnia and Herzegovina, 2003 Law, article 57(1)(g); Brazil, 1981 Decree, article 101, 1980 Law, article 67; Denmark, 2003 Act, article 22(iv); Germany, 2004 Act, article 53(2); Greece, 2001 Law, article 44(1)(a); Japan, 1951 Order, articles 5(5), 24(4)(h); South Africa, 2002 Act, article 29(1)(b); and United States, INA, sections 101(a)(50)(f)(5), 237(a)(2)(B)(i), (E).

[975] Argentina, 2004 Act, article 29(h); Austria, 2005 Act, article 3.53(2)(3); Bosnia and Herzegovina, 2003 Law, articles 27(1)(b)-(c), 47(1)(b)-(c); Brazil, 1980 Law, article 64; Germany, 2004 Act, article 54(3); Hungary, 2001 Act, article 32(1)(b); Italy, 1998 Decree-Law No. 286, articles 4(3), 8; Japan, 1951 Order, articles 5(6), 24(4)(h); Nigeria, 1963 Act, article 18(1)(g)-(h); (3)(a)-(g); Panama, 1960 Decree-Law, article 37(a); Paraguay, 1996 Law, article 6(6)-(7); and United States, INA, sections 101(a)(50)(f)(3), 212(a)(2)(C)-(D).

[976] Italy, 1998 Decree-Law No. 286, article 12(3*ter*), 1998 Law No. 40, article 10(3), 1996 Decree-Law, article 8(1); and United States, INA, section 278.

[977] Bosnia and Herzegovina, 2003 Law, article 47(4).

[978] Bosnia and Herzegovina, 2003 Law, article 57(1)(g).

406. The expulsion of an alien on grounds relating to morality may depend in part on the alien's (1) residency status,[979] or the residency status of the alien's family;[980] (2) eligibility for exemption from visa or other such requirements;[981] (3) length of stay in the State's territory at the time of the relevant act;[982] (4) having entered the State's territory prior to the grounds for expulsion becoming evident;[983] (5) threat to national interests;[984] (6) involvement of aliens from a State not having a special arrangement or relationship with the expelling State;[985] (7) status as a victim of trafficking when committing the relevant act;[986] or (8) transitory status.[987] The alien's dependents may be subject to expulsion under this heading if grounds exist to expel the alien.[988]

407. The national courts of some States have upheld the expulsion of aliens on grounds of morality.[989]

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[979] Austria, 2005 Act, article 3.53(2)(3); Denmark, 2003 Act, article 22(iv); Italy, 1998 Decree-Law No. 286, article 12; and United States, INA, section 212(h).

[980] United States, INA, section 212(h)(1)(B).

[981] Austria, 2005 Act, article 3.53(2)(3).

[982] Austria, 2005 Act, article 3.53(2)(3); Denmark, 2003 Act, article 22(iv); and United States, INA, section 212(h).

[983] China, 1986 Rules, article 7(3); compare Kenya, 1967 Act, article 3(1)(e); and Nigeria, 1963 Act, article 18(1)(h), which consider grounds to exist regardless of whether the act was committed before or after the alien entered the State's territory, and United States, INA, section 212(a)(2)(D)(i)-(iii), which finds grounds to exist if the alien committed prostitution within ten years prior to entering U.S. territory, or intends to engage in such activity while in U.S. territory.

[984] Bosnia and Herzegovina, 2003 Law, article 27(1)(b).

[985] Italy, 1996 Decree-Law, article 8(1).

[986] Canada, 2001 Act, article 37(2)(b); and Japan, 1951 Order, articles 5(7)-2, 24(4)(a).

[987] Japan, 1951 Order, article 24(4).

[988] United States, INA, section 212(a)(2)(C)(ii), (H)(ii)-(iii).

[989] See, e.g., *Re* Th. and D., Conseil d'État, Egypt, 16 March 1953, International Law Reports, 1951, H. Lauterpacht (ed.), Case No. 92, pp. 301-302, at p. 302 ("Article 2 (2) of the Decree-Law of June 22, 1938, enumerates amongst the grounds justifying expulsion the fact of having committed an act contrary to public morality, and the applicants have undoubtedly committed such an act, an act which is against divine as well as human law; if the expulsion is based upon this ground it is certainly justifiable in law.") (involving concubinage); *Hecht v. McFaul and Attorney-General of the Province of Quebec*, Quebec Superior Court, 26 January 1961, International Law Reports, volume 42, E. Lauterpacht (ed.), pp. 226-229 (expulsion for conviction of crimes of moral turpitude). See also *Brandt v. Attorney-General of Guyana and Austin*, Court of Appeal of Guyana, 8 March 1971, pp. 450-496, at p. 460 ("That which was not 'conducive to the public good' of a country might consist of not only opposition to its peace and good order, but also to its 'social' and 'material interests', thereby embracing a wider ambit than the limited category of 'peace and good order'.").

(I) Economic grounds

408. Economic reasons may be considered as a relevant factor in determining the expulsion of an alien on the basis of the public order or welfare of a State (*ordre public*) rather than as a separate ground under international law. Economic reasons have been rejected, however, as a valid consideration with respect to the expulsion of EU citizens. Nonetheless, economic reasons have been recognized as a valid ground for the expulsion of aliens in the national laws of a number of States.[990]

409. The Protocol to the European Convention on Establishment recognizes economic reasons as a possible consideration in the expulsion of aliens on the ground of *ordre public*. The Protocol provides a definition of *ordre public* which includes situations in which aliens are unable to finance their stay in the country or intend to work illegally.

> "The concept of 'ordre public' is to be understood in the wide sense generally accepted in continental countries. A Contracting Party may, for instance, exclude a national of another Party for political reasons, or if there are grounds for believing that he is unable to pay the expenses of his stay or that he intends to engage in a gainful occupation without the necessary permits."[991]

410. In contrast, within the European Union, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 prohibits the expulsion of Union citizens and their family members on grounds of public policy, public security or public health with a view to serving economic ends.[992] The Directive further provides in article 14, paragraph 3, as follows:

> "An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State."

411. Concerning the last point, preambular paragraph 16 of the same directive indicates:

> "As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled.

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[990] "The municipal law systems examined display a perhaps unremarkable consistency in their choice of grounds for expulsion. Generally, an alien will render himself liable to deportation if he qualifies under one or more of the following heads: ... 3. Becoming a 'public charge', to include illness and 'living off social security'." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 255. See also *Règles internationales*, note 56 above, article 46. "As a rule expulsion is only resorted to in case where a person has committed some offence or has become a charge on public funds." Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951 (Articles 32 and 33)*, 1963, published by Division of International Protection of the United Nations High Commissioner for Refugees, 1997, *ad article 33*, para. (2).

[991] Protocol to the European Convention on Establishment, *Section III – Articles 1, 2 and 3* (Paris, 13 December 1955).

[992] *See* Article 27, para. 2, reproduced in Part VII.A.6(c).

> Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security."

412. The national laws of several States include economic reasons as a ground for the expulsion of aliens. The alien's dependents may be subject to expulsion under economic grounds if such grounds exist to expel the alien.[993] In particular, a State may expel or refuse entry to an alien who (1) is in debt,[994] a "gypsy",[995] a vagrant or a person lacking or unable to show means of subsistence,[996] homeless at a given time or for a prolonged period,[997] or unable or unwilling to support the alien's dependents;[998] (2) requires or threatens to require social assistance;[999] (3) lacks a profession, occupation or skills;[1000] (4) is idle,[1001] or fails to undertake the job or activity for which the entry permit was granted;[1002] (5) cannot exercise the alien's chosen profession, or loses or leaves a

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[993] Nigeria, 1963 Act, article 47.

[994] Italy, 1998 Law No. 40, article 11(4)(a).

[995] Panama, 1960 Decree-Law, article 37(b).

[996] Austria, 2005 Act, article 3.53(2)(4); Brazil, 1980 Law, article 64(c); Canada, 2001 Act, article 39; China, 1986 Rules, article 7(5); Finland, 2004 Act, section 11(1)(3); Hungary, 2001 Act, article 4(1)(d); Italy, 1998 Decree-Law No. 286, articles 4, 8; Japan, 1951 Order, article 5(3); Kenya, 1967 Act, article 3(1)(a); Republic of Korea, 1992 Act, article 11(1)(5), (1)(8); Lithuania, 2004 Law, article 7(3); Nigeria, 1963 Act, article 18(1)(a), 1963 Regulations (L.N. 93), articles 5(4), 6(4); Panama, 1960 Decree-Law, article 37(b); Paraguay, 1996 Law, articles 6(7), 79; Poland, 2003 Act No. 1775, articles 15(1), 21(1)(3), 88(1)(3); Portugal, 1998 Decree-Law, article 14(1); Russian Federation, 2002 Law No. 115-FZ, articles 7(8), 9(8), 1996 Law, article 27(6); Spain, 2000 Law, article 25(1); and Sweden, 1989 Act, section 4.2(1).

[997] Germany, 2004 Act, article 55(2)(5); and Russian Federation, 2002 Law No. 115-FZ, articles 7(9), 9(9).

[998] Canada, 2001 Act, article 39; Kenya, 1967 Act, article 3(1)(a); and Russian Federation, 2002 Law No. 115-FZ, articles 7(8), 9(8).

[999] Such a public charge or need for social assistance may involve either the alien or the alien's dependents (Canada, 2001 Act, articles 38(1)(c), (2), 39; Chile, 1975 Decree, articles 15(4), 17, 64(4), 65(1), 66; Japan, 1951 Order, article 5(3); Nigeria, 1963 Act, article 18(1)(a); Panama, 1960 Decree-Law, article 37(e); Republic of Korea, 1992 Act, article 11(1)(5), (1)(8); Switzerland, 1931 Federal Law, article 10(1)(d), (2)-(3); and United States, INA, sections 212(a)(4), 237(a)(5), 250).

[1000] Paraguay, 1996 Law, article 6(7).

[1001] Switzerland, 1949 Regulation, article 16(2).

[1002] Kenya, 1967 Act, article 6(1)(a); compare Argentina, 2004 Act, article 65, which prohibits expulsion for failure to fulfil a work contract obligation unless it was a prerequisite for the grant of the permit.

job;[1003] (6) is disabled or handicapped and thus unable to work;[1004] or (7) acts against or threatens the State's economic order[1005] or its national economy,[1006] industry,[1007] trade,[1008] workers[1009] or livelihood.[1010]

413. National legislation may prohibit the expulsion of an alien on the basis of such grounds once the alien has been in the territory of the State for a certain period of time.[1011] The expulsion of an alien on this ground may depend on whether the alien is a national of a State having a special arrangement with the expelling State.[1012] Depending on the relevant national legislation, these grounds may[1013] or may not[1014] also apply to aliens with transitory status.

414. National jurisprudence has also recognized economic reasons as a valid ground for expulsion.[1015]

[1003] Chile, 1975 Decree, articles 15(4), 17, 64(4), (7), 65(1), 66; and Kenya, 1967 Act, article 6(1)(b).

[1004] Brazil, 1981 Decree, article 52(III)-(IV); Panama, 1960 Decree-Law, article 37(e); and Paraguay, 1996 Law, article 6(3). An exception may be made where such disability or handicap only partially reduces the alien's ability to work (Paraguay, 1996 Law, article 7(2)).

[1005] Republic of Korea, 1992 Act, article 11(1)(4), (1)(8).

[1006] Brazil, 1981 Decree, articles 101, 104, 1980 Law, articles 64, 67, 70; Honduras, 2003 Act, article 89(3); and Panama, 1960 Decree-Law, article 38.

[1007] Japan, 1951 Order, article 7(2).

[1008] Panama, 1960 Decree-Law, article 36.

[1009] Brazil, 1980 Law, articles 2, 64; and Panama, 1960 Decree-Law, articles 36, 37(e).

[1010] Brazil, 1980 Law, articles 2, 64.

[1011] Austria, 2005 Act, article 3.53(2)(5)-(6); Sweden, 1989 Act, sections 2.11, 4.2; and United States, INA, section 237(a)(5).

[1012] Sweden, 1989 Act, section 2.14.

[1013] Lithuania, 2004 Law, article 7(3); Nigeria, 1963 Regulations (L.N. 93), articles 5(4), 6(4); Poland, 2003 Act No. 1775, article 15(1); and Portugal, 1998 Decree-Law, article 14(1).

[1014] Japan, 1951 Order, article 24(4)(a).

[1015] See, for example, *Pieters v. Belgian State (Minister of Justice)*, Conseil d'État, Belgium, 30 September 1953, *International Law Reports*, 1953, H. Lauterpacht (ed.), p. 339 ("In this case the order states that the presence of the complainant is considered harmful to the economy of the country. It appears from the file that the expulsion was ordered by reason of the non-payment by the complainant of taxes due from him.").

(j) Preventive measure or deterrent

415. The expulsion of aliens has been used to prevent or deter certain conduct. The expulsion of aliens on such grounds appears to have diminished by the early twentieth century.[1016] As mentioned previously, in *Carmelo Bonsignore v. Oberstadtdirektor der Stadt Köln*, the European Court of Justice held that public policy grounds for expulsion may only be invoked if they are related to the personal conduct of the individual concerned, and that reasons of a "general preventive nature" are not admissible.[1017] Nonetheless, it has been suggested that international law does not prohibit this ground for expulsion in the absence of a treaty obligation.[1018]

(k) Reprisal

416. The expulsion of aliens has sometimes been used a means of reprisal, particularly in cases of mass expulsion, which is considered separately. The expelling State may indicate other grounds for the expulsion of aliens which nonetheless appear to be reprisals.[1019]

[1016] "The following features of recent developments in the exercise of the power of expulsion may be noted:… it is now rarely used as a preventive measure". Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 55.

[1017] "The reply to the questions referred should therefore be that article 3 (1) and (2) of Directive No. 64/221 prevents the deportation of a national of a member state if such deportation is ordered for the purpose of deterring other aliens, that is, if it is based, in the words of the national court, on reasons of a 'general preventive nature'." Court of Justice of the European Communities, *Carmelo Bonsignore v. Oberstadtdirektor der Stadt Köln*, Case 67-74, Judgment of the Court, 26 February 1975, para. 7.

[1018] "States generally are not prevented from using expulsion as a deterrent measure, i.e. expelling an individual as a warning for others. Such actions, however, may be declared unlawful by treaties (e.g. by the Treaty establishing the European Economic Community, Art. 48, as interpreted by the Court of Justice of the European Communities." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 111.

[1019] "In the nineteenth century, collective expulsions were sometimes stated to be justifiable as a reprisal. Rolin Jacquelmyns, the distinguished Belgian jurist stated that the collective expulsion of aliens in peacetime is only permissible by way of a reprisal see his article 'Droit d'Expulsion des étrangers', *Revue de droit international* (1888) at p. 498. Indonesia justified her expulsion of Dutch nationals in 1957 on the grounds of Holland's failure to negotiate over West Irian. Dahm rightly, it is submitted, considers this justification as having no foundation in international law Völkerrecht, Vol. 1 at p. 529, and it appears his view is correct." Vishnu D. Sharma and F. Wooldridge, note 579 above, p. 411, n. 85. "When in December 1934 Yugoslavia expelled a great number of Hungarian subjects as a reprisal against alleged complicity of Hungarian authorities in the activities of terrorists, it was explained that, in view of a large measure of unemployment in Yugoslavia, the persons in question lived in Yugoslavia under periodically renewable permits only: Toynbee, *Survey*, 1934, pp. 573-7." Robert Jennings, and A. Watts, *Oppeinheim's International Law*, vol. I - Peace (Parts 2 to 4), 9th ed., 1996, p. 944, n. 16. "General Amin did not state that the expulsions were a reprisal for Britain's refusal to grant a larger number of special vouchers to her Ugandan citizens and nationals … He did, however, state that he had been inspired by God, and intended to teach Britain a lesson when he made his original announcement concerning the expulsions …" Vishnu D. Sharma and F. Wooldridge, note 579 above, p. 411 and n. 83.

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417. The legality of the expulsion of aliens as a means of reprisal has been questioned in the literature.[1020] Similarly, according to the Institut de Droit international, retaliation or retorsion does not constitute a valid ground for expelling an alien who has been expressly authorized to reside in a country:

> "The following rules shall not apply in cases of retaliation or retorsion. Nevertheless, aliens residing in the country with the express authorization of the government may not be deported on the grounds of retaliation or retorsion."[1021]

(l) Political activities

418. Political considerations may be a relevant factor in determining the expulsion of aliens on the basis of public order or national security rather than as a separate ground under international law.[1022]

[1020] "From its function, it follows that the power of expulsion must not be 'abused'. If its aim and purpose are to be fulfilled, the power must be exercised in good faith and not for some ulterior motive, such as … an unlawful reprisal." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 307-308 and n. 1 (the note stating that "[t]here are difficulties in determining when a reprisal is lawful. Brownlie observes that, in principle, it should be a reaction to a prior breach of legal duty and be proportionate: *Principles of Public International Law* (2nd ed., 1973), p. 524."). Reprisals which may be contrary to international *jus cogens* can hardly be permissible. Vishnu D. Sharma and F. Wooldridge, note 579 above, p. 411 and n. 84 (referring to "the dissenting opinion of Judge Tanaka in the *South West Africa* cases (1966) I.C.J. Reports at para. 298, which states that human rights, being derived from natural law, are part of the *jus cogens*").

[1021] *Règles internationales*, note 56 above, article 4. [French original]

[1022] "The classical writers acknowledged a power to expel aliens but often asserted that the power may be exercised only for cause. Grotius wrote of the sovereign right to expel aliens who challenge the established political order of the expelling State and indulge in seditious activities there. Pufendorff echoed this sentiment. In early diplomatic correspondence the same principle is expressed with the same qualification." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 461 (citing H. Grotius, *De Jure ac Pacis, Libri Tres*, 1651, Book II, Chap. II, p. xvi; and S. Pufendorf, *De Jure Naturae et Gentium, Libri Octo*, 1866, Book III, Chap. III, para. 10). "In addition to the economic and social grounds of undesirability, political reasons, especially war, have often been the basis of expulsion orders." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 52. "The power of expulsion or deportation may be exercised if an alien's conduct or activities after being admitted into the state violate certain basic rules. Such conduct or activities include: … 4. Participating in undesirable political activities." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy vol. 23, Washington D.C., American Society of International Law, 1992, pp. 90-91. "Expulsion following judicial sentence and expulsion which is ordered by the executive on general political grounds are readily distinguishable [from an acceptable expulsion for violation of local law], but here too, in respect to the latter, it is accepted that the 'policy' of each nation must determine whether it will permit the continued residence of the alien." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 206-207 (citations omitted).

419. As noted previously, the Parliamentary Assembly of the Council of Europe affirmed the prohibition of the expulsion of aliens, including illegal aliens, on political or religious grounds in recommendation 769 (1975).[1023]

420. The national laws of some States provide for the expulsion of an alien who (1) takes part in the State's domestic politics,[1024] such as by voting when not authorized to do so,[1025] or by abusively interfering with the political participation rights which the State reserves for its nationals;[1026] (2) is a member of a totalitarian or fascist party, or a party focused on worldwide revolution;[1027] or (3) presents ideologically false documents or other information to the State's authorities.[1028] The relevant legislation may expressly permit the application of criminal penalties in addition to expulsion when grounds exist under this heading.[1029]

421. The national courts of some States have dealt with cases involving the expulsion of aliens for reasons relating to their political activities.[1030] However, most of these expulsions have been justified on other grounds, such as public order or national security.[1031]

[1023] "An alien without a valid residence permit may be removed from the territory of a member state only on specified legal grounds which are other than political or religious." Council of Europe, note 607 above, para. 9.

[1024] A State may prohibit or restrict the alien's participation in its domestic politics or public affairs (Brazil, 1980 Law, articles 106-07; and Republic of Korea, 1992 Act, article 17(2)-(3)), or in its cultural or other organizations (Brazil, 1980 Law, articles 107-09).

[1025] Brazil, 1980 Law, articles 124(XI), 127; and United States, INA, sections 212(a)(10)(D), 237(a)(6).

[1026] Portugal, 1998 Decree-Law, article 99(1)(d).

[1027] Belarus, 1998 Law, article 14; and United States, INA, sections 101(a)(37), (40), (50)(e), 212(a)(10)(D).

[1028] Argentina, 2004 Act, articles 29(a), 62(a).

[1029] Brazil, 1980 Law, articles 124(XI), 125-27; and Portugal, 1998 Decree-Law, article 99(2).

[1030] See, e.g., *Perregaux*, Conseil d'État, France, 13 May 1977, *International Law Reports*, volume 74, E. Lauterpacht, C.J. Greenwood (eds.), pp. 427-430; *Bujacz v. Belgian State (Minister of Justice)*, Conseil d'État, Belgium,13 July 1953, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 336-337; *Lopez v. Howe, Immigration Commissioner,* United States Circuit Court of Appeals, Second Circuit, 14 May 1919 [Annual Digest of Public International Law Cases, 1919-1922, Sir John Fischer Williams and H. Lauterpacht (eds.), Case No. 177, pp. 252-253 (Expulsion of prominent philosophical anarchist); *Ex Parte Pettine*, United States District Court, District of Massachusetts, 3 June 1919, Annual Digest of Public International Law Cases, 1919-1922, Sir John Fischer Williams and H. Lauterpacht (eds.), Case No. 176, pp. 251-252; *Galvan v. Press, Officer in Charge, Immigration and Naturalization Service,* United States, Supreme Court, 24 May 1954, *International Law Reports*, 1954, H. Lauterpacht (ed.), pp. 213-218.

[1031] See, e.g., *Perregaux*, Conseil d'État, France, 13 May 1977, *International Law Reports*, volume 74, E. Lauterpacht, C.J. Greenwood (eds.), pp. 427-430, at p. 429 ("Behaviour of a political nature is not, of itself, sufficient to provide legal justification for the deportation of an alien whose presence on French territory does not constitute a threat to public order or public confidence."); *Bujacz v. Belgian State (Minister of Justice)*,

(m) Other

422. There may be other grounds for the expulsion of aliens that are not as widely recognized or as relevant in contemporary practice, for example, bringing an unjust diplomatic claim.[1032]

7. The principle of non-discrimination

423. The principle of non-discrimination[1033] would appear to limit the extent to which race,[1034] sex, religion,[1035] nationality or any other discrimination prohibited by international law may constitute a valid ground for the expulsion of aliens.[1036]

Conseil d'État, Belgium, 13 July 1953, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 336-337, at p. 337 ("The applicant claims that aliens are entitled to enjoy 'freedom of thought' and 'freedom of political association'; however, the enjoyment of these liberties by aliens is necessarily limited by legal provisions which, in application of Article 128 of the Constitution, permit activities deemed harmful to the safety of the country to be punished by expulsion."); *In re Everardo Diaz*, Supreme Federal Tribunal of Brazil, 8 November 1919, Annual Digest of Public International Law Cases, 1919-1922, Sir John Fischer Williams and H. Lauterpacht (eds.), Case No. 179, pp. 254-257, at pp. 255-256 ("The State had no obligation to be burdened with the difficult work, at times ineffective, of constant vigilance over the actions of foreigners putting their theory into practice. It need not await overt action on the part of such aliens.") (involving the expulsion of an anarchist).

[1032] "In some countries of Latin-America the bringing of an unjust diplomatic claim against the state, unless it be adjusted in a friendly manner, is a ground for expulsion." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 52, n. 3 (Constitution of Nicaragua, art. 12).

[1033] *See* Part VI.B.2.

[1034] "Diplomatic practice of the latter part of the last century appears to establish that at that date a State was not entitled to complain of the expulsion of one of its nationals for ethnic or racial reasons, even though it might deplore the ignorance of true principles of government which lead to the adoption of a discriminatory policy of expulsion. Modern practice, on the other hand, establishes the impermissibility of racial discrimination in this respect. A State which is actuated by racial considerations in determining to expel an alien nowadays will seldom acknowledge the fact." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 462 (citations omitted).

[1035] "It would be difficult to maintain that a State violates a duty imposed by international law if it sees fit to expel an alien who persists in teaching or proselytizing in behalf of a religious sect whose tenets are deemed gravely objectionable to such State. That the United States does not enquire into the religious views of its nationals, and seeks to protect equally all residents within its domain without regard to their opinions on such matters, does not suffice to fetter the freedom of other states that elect to proceed upon a different principle." Charles Cheney Hyde, *International Law; Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 234 (citations omitted).

[1036] "Expulsion purportedly based on nationality, but in fact selective by reference to racial or ethnic criteria, clearly offends against the principle of non-discrimination." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 215. "In certain conditions expulsion… may infringe the principle of non-discrimination (racial or religious) which is part of customary international law." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p.

424. The prohibition of discrimination in relation to the expulsion of aliens has been recognized in general terms by the Iran-United States Claims Tribunal in the *Rankin* case. According to the Tribunal, discrimination is one of the factors that may render an expulsion unlawful under international law:

> "A claimant alleging expulsion has the burden of proving the wrongfulness of the expelling State's action, in other words that it was arbitrary, discriminatory, or in breach of the expelling State's treaty obligations."[1037]

425. The Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the General Assembly in 1985, expresses, in its article 7 *in fine*, the prohibition of individual or collective expulsion based on discriminatory grounds:

> "Individual or collective expulsion of such aliens [*i.e.* aliens lawfully in the territory of a State] on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited."[1038]

426. The Human Rights Committee has referred to the principle of non-discrimination in relation to the expulsion of aliens in its General Comment No. 15. Commenting on article 13 of the International Covenant on Civil and Political Rights, which sets forth procedural guarantees in relation to the expulsion of aliens,[1039] the Human Rights Committee stressed that

> "Discrimination may not be made between different categories of aliens in the application of article 13."[1040]

427. The Committee on the Elimination of Racial Discrimination has expressed concern about cases of racial discrimination in relation to the expulsion of aliens in several concluding

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499. "There should be no discrimination because of race or religion." Amos S. Hershey, *The Essentials of International Public Law and Organization*, rev. ed., New York, The Macmillan Company, 1927, p. 375, sec. 247 (citation omitted). "An expulsion founded upon a special discrimination against an alien, on account of his nationality, race or creed may be and has often been considered an unfriendly act to his national government, and has given rise to diplomatic claims.' Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 61 (citation omitted). See also Vishnu D. Sharma and F. Wooldridge, note 579 above, pp. 408-409; and R. C. Chhangani, "Expulsion of Benin Nationals and International Law", *Indian Journal of International Law*, vol. 20, 1980, pp. 149-154, at p. 151 (citing A.A.L.C.C, *Report of the Fourth Session*, 1961, pp. 170-72).

[1037] *Rankin v. The Islamic Republic of Iran*, note 136 above, pp. 135-152, at p. 142, para. 22.

[1038] Resolution 40/144, Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live, 13 December 1985.

[1039] *See* also Part VIII.B.1.

[1040] Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, para. 10.

observations.[1041] In its general recommendation XXX, the Committee recommended that States parties to the International Convention on the Elimination of All Forms of Racial Discrimination[1042] not discriminate on the basis of race, colour, ethnic or national origin in expelling aliens and in allowing them to pursue effective remedies in case of expulsion:

> "[The Committee] recommends … that the States parties to the Convention, as appropriate to their specific circumstances, adopt the following measures: […]
>
> "Ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies."[1043]

428. Political and religious grounds for the expulsion of an alien have also been considered unlawful. Attention may be drawn in this respect to recommendation 769 (1975) of the Parliamentary Assembly of the Council of Europe, which affirms the prohibition of expulsions based on political or religious grounds, even with respect to illegal aliens:

[1041] *See*, for example, Concluding observations of the Committee on the Elimination of Racial Discrimination: France, 1 March 1994, A/49/18, para. 144 ("Concern is expressed that the implementation of these laws [*i.e.* laws of immigration and asylum] could have racially discriminatory consequences, particularly in connection with the imposition of limitations on the right of appeal against expulsion orders and the preventive detention of foreigners at points of entry for excessively long periods."); Concluding observations by the Committee on the Elimination of Racial Discrimination: France, 23 March 2000, CERD/C/304/Add.91 (19 April 2000), para. 9 ("The Committee expresses concerns about possible discrimination in effect in the implementation of laws providing for the removal of foreigners from French territory, including persons in possession of valid visas, and the delegation of responsibilities which should be exercised by States officials."), as well as Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada, 1 November 2002, A/57/18, para. 336 ("The Committee notes with concern that current immigration policies, in particular the present level of the "right of landing fee", may have discriminatory effects on persons coming from poorer countries. The Committee is also concerned about information that most foreigners who are removed from Canada are Africans or of African Descent.)"

[1042] "It is true that the International Convention on the Elimination of All Forms of Racial Discrimination, so far as it is material, prohibits racial discrimination only in respect of limitations on freedom of movement and residence within the borders of the State and in respect of limitations on the right to leave any country including one's own and to return to it. Thus it is silent on the question of discrimination in respect of expulsion. No significance is to be attached to this circumstance, however, since the civil rights listed in that Convention are taken from the Universal Declaration of Human Rights which was silent on expulsion generally; and this was so less for reason of principle than because of European preoccupations in 1948. Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 476 (citations omitted).

[1043] Committee on the Elimination of Racial Discrimination, general recommendation XXX: Discrimination Against Non-Citizens, 64th session, 23 February-12 March 2004, CERD/C/64/Misc.11/rev.3, para. 25.

> "An alien without a valid residence permit may be removed from the territory of a member state only on specified legal grounds which are other than political or religious."[1044]

429. As far as racial discrimination is concerned, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Baroness Elles, supported the view that discriminatory expulsions on racial grounds are contrary to international law:

> "It has been held that discriminatory expulsions on racial grounds are contrary to international law, relying on the human rights provisions of the United Nations Charter, the force of the Universal Declaration and, with more recent effect, the International Convention on the Elimination of All Forms of Racial Discrimination and the legally binding International Covenant on Civil and Political Rights."[1045]

8. Disguised extradition

430. The compulsory departure of an alien may also be achieved by means of an expulsion which is actually a "disguised extradition". Although these procedures are similar in that they both result in the compulsory departure of an alien, they are also different in a number of respects, including (1) the substantive and procedural requirements; (2) the possibility of voluntary departure; and (3) the destination of the alien.[1046] Thus, the distinction between the two procedures may be important for purposes of determining the lawfulness of the act in question in accordance with the relevant legal standards.[1047]

431. There are four issues that may require consideration with respect to the relationship between expulsion and extradition in the present context.[1048] First, to what extent is the lawfulness of an

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[1044] Council of Europe, note 607 above, para. 9.

[1045] International provisions, note 661 above, para. 286.

[1046] *See* Part III.C.1(e).

[1047] "Expulsion as an action to preserve the public security of the State must be distinguished from extradition, since the latter applies to criminal prosecutions, supports the principle of legal assistance between States, and thus suppresses criminality. Extradition is primarily performed in the interest of the requesting State, whereas expulsion is performed in the exclusive interest of the expelling State. Extradition needs the consensual cooperation of at least two States, whereas expulsion is a unilateral action apart from the duty of the receiving State to accept its own national. Therefore, for reasons of either international law or municipal law, the expulsion of an individual may be illegal, whereas the extradition of the same person may be lawful, and vice versa." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 110.

[1048] "The practice of States differs at this time with respect to the relationship between extradition and expulsion or deportation. Some States still adhere to the traditional view that if extradition is available, the individual concerned is entitled to all safeguards surrounding that procedure and it should be used instead of expulsion. Other States consider that the two procedures are cumulative and complementary, especially where a person being expelled is entitled to invoke safeguards similar to those available in extradition proceedings. Of course, if expulsion which is a disguised or *de facto* extradition affected by the ulterior motive in terms of the validity of the ground for expulsion as well as considerations of good faith or abuse of power?[1049] Secondly, to what extent does a State have a freedom of choice with respect to the procedure used to compel an alien to leave its territory?[1050] Thirdly, to what extent is a State precluded from proceeding with the otherwise lawful expulsion of an alien in circumstances in which extradition would be unlawful?[1051] Fourthly, to what extent is a State precluded from proceeding with the otherwise lawful expulsion of an alien in circumstances in which extradition or prosecution is obligatory (*aut dedere*

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such safe guards do not exist, basic rules of international human rights law may be violated, especially when a person is unceremoniously escorted across a border on the basis of a simple oral arrangement between minor officials of the two countries involved." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 95.

[1049] "For example, the 'right' of expulsion may be exercised with the intention of effecting a *de facto* extradition ... In such cases the exercise of the power cannot remain untainted by the ulterior and illegal purpose." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 209.

[1050] "Extradition treaties do not seem generally to affect this issue. They tend to facilitate cooperation among States rather than to give additional rights to an accused person. It would be difficult to conclude from a treaty on extradition that a person who could be lawfully expelled to a certain country would be exempt from expulsion once the State of destination makes a request in view of submitting the same person to criminal proceedings. The contrary view was unconvincingly argued by Lord Griffiths in the House of Lords in the *Bennett* case, whereas the existence for an accused person of a right only to be subject to extradition proceedings was more recently denied by the U.S. Court of Appeals for the Ninth Circuit in the case of *Matta-Ballesteros*, a Honduran who had been abducted from his home in Honduras by U.S. and Honduran agents. A note, in which the Canadian Department of External Affairs held that the bilateral treaty with the United States 'established the only means under which to obtain the return of fugitive offenders', has to read in the light of the circumstances, the forcible abduction of an offender by United States officials on Canadian territory. A different solution on the basis of an extradition treaty could more persuasively be argued if there was a risk that because of the expulsion the accused person's human rights would be infringed in the ensuing criminal proceedings." Giorgio Gaja, note 28 above, pp. 299-300 (citing Judgement of 24 June 1993, *All England Law Reports* (1993)(3) 138 at 150; Judgement of 1 December 1995, 107 *I.L.R.*. 429 at 433; and Note of 24 April 1991, 31 *I.L.M.* (1992) 932, respectively).

[1051] "Also, expulsion may not, as the Institute of International Law resolved in 1892, degenerate into a disguised extradition when extradition would not normally be available. Deportation to the country of the crime would amount to this, and if the country of the crime is not the national country, the latter might well have ground for protesting at this abuse of international criminal jurisdiction." D. P. O'Connell, *International Law*, vol. 2, 2nd ed., London, Stevens & Sons, 1970, p. 710 (citations omitted). "The position is also taken that an unlawful extradition should not be replaced by an expulsion; but such a principle, even when recognized, can only derive from municipal law and not from international law." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 110. For example, Brazil's legislation specifically forbids an expulsion that would constitute an extradition prohibited by Brazilian law, as is the case when the person is a Brazilian citizen, except when the person acquired Brazilian citizenship only after committing the act in question (Brazil, 1980 Law, articles 62, 74 and 76).

aut judicare)?[1052] These issues have been addressed to some extent in international law, national law and literature.

(a) Disguised or *de facto* extradition

432. A distinction may be drawn between a "disguised extradition" and a "*de facto* extradition". In this regard, the term "disguised extradition" may have a negative connotation since it implies an ulterior motive which may indicate an abuse of right or bad faith. In contrast, the term "*de facto* extradition" may have a neutral connotation since it implies the recognition of an additional consequence of the expulsion of an alien as a factual matter.

> "It is undoubtedly true that, where the destination selected is one at which the authorities are anxious to prosecute or punish the deportee for a criminal offence, the deportation may result in a *de facto* extradition. Thus it has become usual to describe such deportation as 'disguised extradition', but it would seem advisable to use this term with caution. A true 'disguised extradition' is one in which the vehicle of deportation is used with the prime motive of extradition. This would appear most clearly, for example, where the fugitive, a national of A, enters the territory of B from State C, but is deported to State D, where he is wanted on criminal charges. Examples, however, of such blatant disguised extradition are rare. Where deportation is ordered to the State of embarkation or the national State, the description 'disguised extradition' is really a conclusion drawn by the authors of it as to the mind of the deporting authorities. While the motive of restoring a criminal to a competent jurisdiction may indeed be uppermost in the intention of the deporting State, it may also in many cases be a genuine coincidence that deportation has this result. It is proposed therefore to use the neutral term '*de facto* extradition' here."[1053]

[1052] The expulsion of aliens may need to be reconciled with the international law principle of "extradite or prosecute (*aut dedere aut iudicare*)", which is increasingly considered to be generally applicable to international terrorist offences. *See* Cherif Bassiouni, "Legal responses to international terrorism: U.S. procedural aspects", *International studies on terrorism*, Martinus Nijhoff Publishers, Dordrecht, 1988, p. xlv ("Treaties, customary practice, and the national laws of states establish the basis for international cooperation in the prevention and suppression of criminality. The maxim commonly referred to in this context is *aut dedere aut iudicare."); cf.* Rosalyn Higgins and Maurice Flory (eds.), *Terrorism and International Law*, London, Florence, KY Routledge, 1997, p. 26. "For the moment the *aut dedere aut punire* principle remains treaty based. But the pattern is becoming sufficiently clear, and the ratifying parties sufficiently substantial, for the question soon to be asked, whether, as a matter now reflective of general international law, the *aut dedere aut punire* principle applies to terrorist offenders."

[1053] Ivan Anthony Shearer, *Extradition in International Law,* Manchester, University Press, 1971, p. 78. Shearer traces the use of the term "disguised extradition" to the decision of a French court in the mid-nineteenth century: "The term *extradition déguisée* was used as early as 1860 by a French court ...". Ibid., at p. 78, n. 2 (citing Decocq, André, « La livraison des délinquants en dehors du droit commun de l'extradition », *Revue Critique de Droit International Privé*, 1964, pp. 411-424).

433. While the distinction between disguised and *de facto* extradition may be useful, it does not appear to have been uniformly recognized in practice. The notion of disguised extradition has been described as follows:

> "In the practice known as 'disguised extradition', the usual procedure is for the individual to be refused admission at the request of a foreign State, and for him to be deported to that or any other State which wishes to prosecute or punish him. The effect is to override those usual provisions of municipal law which commonly permit the legality of extradition proceedings to be contested and allow for the submission of evidence to show that the individual is being pursued for political reasons.
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> "While the legality of the resort to immigration laws for such purposes has long been controversial, it may also be argued that the immigration laws have a supporting role to play in the international control of criminals, and that therefore de facto extraditions made under those laws are justified. It may indeed be a little spurious to demand the use of extradition proceedings in a State which has already decided, as a matter of immigration policy, that the alien will not be allowed to remain. Be that as it may, the established and primary purpose of deportation is to rid the State of an undesirable alien, and that purpose is achieved with the alien's departure. His destination, in theory, should be of little concern to the expelling State, although in difficult cases it may put in issue the duty of another State to receive its national who has nowhere else to go. Unlike extradition, which is based on treaty, expulsion gives no rights to any other State and, again in theory, such State can have no control over the alien's destination.
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> [...]
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> "The case for simplified extradition procedures will continue to be strongly argued, particularly between allied or friendly States. Delay and expense are reduced, and expulsion under the immigration laws circumvents the inconveniences of a weak case, the absence of the offence charged from the extradition treaty, and even the lack of a treaty itself. Yet it is apparent that modern expulsion laws have been developed with some regard being paid to the requirements of due process and to the desirability of a right of appeal. To this extent, these laws reflect the growth of human rights principles and they may be taken as some evidence of contemporary State attitudes to the rights of individuals."[1054]

[1054] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 223-225 (citations omitted).

(b) Expulsion or extradition

434. As early as 1982, the Institut de Droit International distinguished between expulsion and extradition.[1055] It also emphasized that the handing over by a State of a criminal who has taken refugee in its territory may only be effected if the conditions for extradition are met:

> "Deportation and extradition measures shall be independent of each other; the fact that extradition has been refused does not mean that the right to deport has been renounced."[1056]
>
> "A deportee who has taken refuge in a territory in order to avoid criminal prosecution may not be handed over, by devious means, to the prosecuting State unless the conditions for extradition have been duly met".[1057]

435. The principle that an expulsion, in order to be lawful, must not constitute a disguised extradition was also affirmed by the Parliamentary Assembly of the Council of Europe. In its Recommendation 950 (1982) on extradition of criminals, the Parliamentary Assembly noted that

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[1055] *See* also Part III.C.1(e).

[1056] «Les mesures d'expulsion et d'extradition sont indépendantes l'une de l'autre; le refus d'extradition n'implique pas la renonciation au droit d'expulsion.» *Règles internationales*, note 56 above, article 15.

[1057] «L'expulsé réfugié sur un territoire pour se soustraire à des poursuites au pénal, ne peut être livré, par voie détournée, à l'Etat poursuivant, sans que les conditions posées en matière d'extradition aient été dûment observées.» Ibid., article 16. "In 1892 the Institute of International Law resolved that expulsion may not degenerate into a disguised extradition, when extradition would not be available. Modern State practice shows that that resolution is not an expression of *lex lata.* In *R. v. Brixton Prison, ex parte Soblen* [[1963] 2Q.B.243] it was alleged that the Home Secretary had authorised the alien's deportation in order to secure his rendition to the United States as a fugitive, who was not amenable to extradition by reason of the political nature of his offence. The Court found no objection to the deportation but stated that it was not satisfied that the United States authorities had sought Dr Soblen's return. From this we may infer that the Court would have quashed the deportation order if (but only if) satisfied that it was made *mala fide,* and not for the reasons stated in the Aliens Order [Aliens Order 1953, S.I. No. 1671]. The *Soblen* case does not stand alone. The Israeli Supreme Court has upheld as valid the deportation of an alien to a country in which he was liable to arrest even though he could not have been extradited for the offence [*Joanovici,* (1958) 12 Sup. Ct. 646] It seems from the legislative provisions in force in Canada [Immigration Act, S.C. 1976-77, cap. 52, section 54(2)], India [A. Sinha, *Law of Citizens and Aliens in India,* 1962 at 22], and Nigeria [1963 Act, as amended, section 17] that no objection may be raised to the making of directions for an alien's deportation from those countries on the ground that his arrest is sought in the jurisdiction to which he is to be removed. While the opposite rule applies in some other countries, perhaps constituting the majority, there is no consensus on the point, and the most that can be said is that an exercise in comparative law yields support for the proposition that States may not select arbitrarily the destination to which an alien is to be sent." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 469, n. 136 (citing for the opposite rule Australia: *Znaty v. Minister for Immigration,* 126 C.L.R. (1976) 1; *Barton v. Commonwealth,* 131 C.L.R. (1974) 477; Japan: Law No. 68 of 21 July 1953, Article 2(1); and France: 'the trial of *Klaus Barbie* came about in consequence of his deportation, rather than extradition, which constituted no jurisdictional impediment in the French courts: 6 October 1983,1984 D.113.")

> "[i]n certain instances, criminals have been expelled to a country which might otherwise have made a request for extradition, but that such expulsion procedure is arbitrary and therefore unsatisfactory."[1058]

436. In contrast, the European Commission of Human Rights has held that an expulsion which constitutes a disguised extradition is not necessarily unlawful under the European Convention of Human Rights:

> "In *C. v. Federal Republic of Germany* the European Commission of Human Rights found that the Convention does not prohibit a State from expelling an individual towards its country of origin when criminal proceedings are taking place against him in this country or he has already been sentenced there. Looking from the perspective of the State of destination, the Commission had already found in *Altmann* that 'even if the applicant's expulsion could be described as a disguised extradition, this would not, as such, constitute a breach of the Convention'."[1059]

437. The national courts of various States have been called upon to determine whether an expulsion constituted a disguised extradition.[1060] In some cases, the national courts have considered the purpose of the expulsion and the intention of the States concerned in order to make such a determination.[1061]

[1058] Council of Europe, Parliamentary Assembly, Recommendation 950 (1982) on extradition of criminals, 1 October 1982, para. 8.

[1059] Giorgio Gaja, note 28 above, p. 299 (citing Decision of 2 December 1985. In 45 *Decisions and Reports* 198 at 209 and Decision of 4 July 1984 in 37 *Decisions and Reports* 225 at 233, respectively).

[1060] See, for example, *Barton v. Commonwealth of Australia*, High Court, 20 May 1974, *International Law Reports*, volume 55, E. Lauterpacht, C. J. Greenwood (eds.), pp. 11-37; *Lülf v. State of the Netherlands*, Court of Appeal of The Hague, 17 June 1976, *International Law Reports*, volume 74, E. Lauterpacht, C. J. Greenwood (eds.), pp. 424-426; *R. v. Bow Street Magistrates, ex parte Mackeson*, High Court of England (Divisional Court), 25 June 1981, *International Law Reports*, volume 77, E. Lauterpacht, C. J. Greenwood (eds.), pp. 336-345; *R. v. Guildford Magistrates' Court, ex parte Healy*, High Court of England (Divisional Court), 8 October 1982, *International Law Reports*, volume 77, E. Lauterpacht (eds.), C. J. Greenwood, pp. 345-350; *Mackeson v. Minister of Information, Immigration and Tourism and Another*, Zimbabwe Rhodesia, High Court, General Division, 21 November 1979, *International Law Reports*, volume 88, E. Lauterpacht, C. J. Greenwood, A. G. Oppenheimer (eds.), pp. 246-259; *Residence Prohibition Order Case (2)*, Federal Republic of Germany, Superior Administrative Court of Münster, 1 October 1968, *International Law Reports*, volume 61, E. Lauterpacht, C. J. Greenwood (eds.), pp. 433-436; *Hans Mutter of Numberg* v. *Superintendent, Presidency Jail, Calcutta, and Others*, 1955, Supreme Court of India, *International Law Reports*, volume 22, E. Lauterpacht, C. J. Greenwood (eds.), p. 497; *Mohamed and Another*, note 221 above, p. 469. In analyzing contested expulsions and their consequences, courts have looked in particular to the form, the substance and the purpose of disputed procedures.

[1061] "[T]here was no question of veiled extradition, because there had been no evidence that the State had influenced West Germany's decision to withdraw the request for extradition, and the State reasonably felt obliged to hand over the West German to the West German border police since only West Germany was bound to

438. In this regard, attention may be drawn to a case decided by the Constitutional Court of South Africa. The applicants challenged the lawfulness of the removal of Mr. Mohamed to the United States by invoking that such a deportation constituted a disguised extradition. The Court decided the case based on other considerations, namely the fact that the surrender of Mr. Mohamed to the United States, where he would face the death penalty, was contrary to the Constitution of South Africa. Nonetheless, the Court's consideration of the distinction between deportation and extradition may be of interest for present purposes.

> "Deportation and extradition serve different purposes. Deportation is directed to the removal from a state of an alien who has no permission to be there. Extradition is the handing over by one state to another state of a person convicted or accused there of a crime, with the purpose of enabling the receiving state to deal with such person in accordance with the provisions of its law. The purposes may, however, coincide where an illegal alien is 'deported'

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admit him, and the State was justified in assuming that no other country would be willing to admit him since he had no valid travel document." *Lülf v. State of the Netherlands,* Court of Appeal of The Hague, 17 June 1976, *International Law Reports,* volume 74, E. Lauterpacht, C.J. Greenwood (eds.), pp. 424-426, at p. 426: "If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America because they had asked for him, then it would be unlawful. But if the Home Secretary's purpose was to deport him to his own country because the Home Secretary considered his presence here to be not conducive to the public good, then the Home Secretary's action is lawful. It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose." *Reg v. Governor of Brixton Prison, Ex parte Soblen,* High Court of England of Justice, Queen's Bench Division, 24 August 1962, *International Law Reports*, volume 33, E. Lauterpacht (ed.), pp. 255-293, at p. 280. "[T]here is no ground whatever for supposing the police have tried to persuade the United States' authorities to deport this applicant so that they could arrest him in this country and thus circumvent the provisions of the extradition treaty between the two countries." *R. v. Guildford Magistrates' Court, ex parte Healy,* High Court of England (Divisional Court), 8 October 1982, *International Law Reports*, volume 77, E. Lauterpacht, C.J. Greenwood (eds.), pp. 345-350, at p. 348; "Put simply, the question is this: Was the power to detain the petitioner exercised for the purpose of ensuring the expulsion from this country of an undesirable inhabitant — a person whose continued presence is not conducive to public good? Or was such power exercised for the ulterior purpose of removing to the United Kingdom, in the interests of justice generally, a person accused of having transgressed the laws of that country?" *Mackeson*, note 1060 above, p. 251; "Similarly expulsion may not be ordered as a means of evading this prohibition against extradition. However, such expulsion is deemed inadmissible only where it has become evident that the intention of the authorities was to avoid the restrictive regulations on extradition." *Residence Prohibition Order Case (2),* Federal Republic of Germany, Superior Administrative Court of Münster, 1 October 1968, *International Law Reports*, volume 61, E. Lauterpacht, C.J. Greenwood (eds.), pp. 433-436, at p. 435. *See* also *Lopez de la Calle Gauna,* Conseil d'État, France, 10 avril 2002 (expulsion to State of nationality is allowed even if criminal charges are pending there so long as no request for extradition has been submitted). But *see,* "[T]he fact that a request [for extradition] has been made does not fetter the discretion of the Government to choose the less cumbrous procedure [of expulsion] of the Aliens Act when a foreigner is concerned, provided always that in that event the person concerned leaves India a free man." *Muller v. Superintendent, Presidency Jail, Calcutta and Others,* Supreme Court of India, 23 February 1955, *International Law Reports*, 1955, H. Lauterpacht (ed.), pp. 497-500, at p. 500. "If the petitioner, outside of our territory, were not left at liberty but were to be sent to Italy [where criminal charges for political activities were likely], there would really be carried out a true extradition which the Italian Government has not requested and which the Brazilian Government has not decided to grant." *In re Esposito,* Federal Supreme Court of Brazil, 25 July 1932, *Annual Digest and Reports of Public International Law Cases*, 1933-1934, H. Lauterpacht (ed.), Case No. 138, pp. 332-333, at p. 333.

> to another country which wants to put him on trial for having committed a criminal offence the prosecution of which falls within the jurisdiction of its courts.
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> "Deportation is usually a unilateral act while extradition is consensual. Different procedures are prescribed for deportation and extradition, and those differences may be material in specific cases, particularly where the legality of the expulsion is challenged. In the circumstances of the present case, however, the distinction is not relevant. The procedure followed in removing Mohamed to the United States of America was unlawful whether it is characterised as a deportation or an extradition. Moreover, an obligation on the South African government to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country cannot depend on whether the removal is by extradition or deportation. That obligation depends on the facts of the particular case and the provisions of the Constitution, not on the provisions of the empowering legislation or extradition treaty under which the 'deportation' or 'extradition' is carried out."[1062]

439. In an early case, the Supreme Court of India recognized the principle of the freedom of choice of the State in determining the procedure for compelling the departure of an alien from its territory:

> "The Aliens Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision limiting this discretion in the Constitution, an unrestricted right to expel remains. […] The Aliens Act is not governed by the provisions of the Extradition Act. The two are distinct and neither impinges on the other. Even if there is a request and a good case for extradition, the Government is not bound to accede to the request … Therefore, if it chooses not to comply with the request, the person against whom the request is made cannot insist that it should. The right is not his; and the fact that a request has been made does not fetter the discretion of the Government to choose the less cumbrous procedure of the Aliens Act when a foreigner is concerned, provided always that in that event the person concerned leaves India a free man. If no choice had been left to the Government, the position would have been different; but as the Government is given the right to choose, no question of lack of good faith can arise merely because it exercises the right of choice which the law confers. This line of attack on the good faith of the Government falls to the ground."[1063]

440. In *Barton v. Commonwealth of Australia*, the High Court of Australia examined the situation where the Government of Australia requested the extradition of an Australian national from Brazil. The Court noted that the Australian Government made the following request through its diplomatic channels:

[1062] *Mohamed and Another*, note 221 above, pp. 486-487, paras. 41-42.

[1063] *Muller v. Superintendent, Presidency Jail, Calcutta and Others,* Supreme Court, 23 February 1955, *International Law Reports*, 1955, H. Lauterpacht (ed.), pp. 497-500, at pp. 498-500.

> "'In the absence of an Extradition Treaty between Brazil and Australia, the Embassy has the honour to request that the detention action be taken under the terms of Article 114 of decree law 66.689 of 11 June 1970. Although similar legislation does not exist in Australian law, there are deportation procedures under the Migration Act which, with the approval of Ministers, could be applied in the event of a fugitive being sought by Brazil from Australia.'"[1064]

441. While the Court held that the request for extradition was lawful, it held that the reciprocity requirement for extradition without an extradition treaty could not be satisfied by reference to provisions of law relating to deportation, since the two procedures were distinct. Chief Justice Barwick pointed out:

> "In contrast to extradition as a means of surrender, most countries exercise a right of expulsion of persons whose continued presence in the country is considered undesirable. Where this right of expulsion is the subject of statutory regulation, as it usually is in common law countries, there are limitations upon its exercise, often involving and limiting the purpose which may prompt the expulsion. At times, questions may arise as to whether the actual purpose of the expulsion is impermissible and whether in truth an unauthorized, or what a writer has called 'disguised extradition' (see O'Higgins in 27 Mod LR 521), is on foot. Clearly, a power of expulsion, as for example under migration or immigration laws, is no equivalent of a power to extradite. It is an unsatisfactory practice, from an international as well as a domestic point of view, to employ a power of expulsion as such a substitute. Further, an executive, being bound by statute as to the occasions for and purposes of expulsion, cannot validly agree to employ that power as a general equivalent to a power to extradite, however much on occasions the expulsion may serve as an extradition in an individual case because of its circumstances. There are obvious objections to the use of immigration or expulsive powers as a substitute for extradition: see *Shearer, Extradition in International Law* pp 19, 87-90; see also *O'Higgins, Disguised Extradition*, 27 Mod LR 521-539; *Hackworth's Digest of International Law*, vol. 4, p. 30."
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> […]
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> "Thus, where the power to surrender does not exist apart from statute, as is the case in Australia, the requesting country cannot with propriety offer reciprocity in respect of persons or crimes falling outside the scope of the relevant legislation or with States to which the legislation does not apply. Nor could a country pledge itself to use its power of expulsion as a power to extradite so as to satisfy the need of reciprocity. For reasons to which I have briefly adverted, the limited purpose for which the power of expulsion may properly be used renders it quite inadequate to support an assurance of extradition of any fugitive on request. Thus, in the case of Australia, the Migration Act 1958-1966 could not serve as an equivalent of the

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[1064] *Barton v. Commonwealth of Australia,* High Court, 20 May 1974, *International Law Reports*, volume 55, E. Lauterpacht, C. J. Greenwood (eds.), pp. 11-37, at p. 12.

power of extradition, nor could that Act's existence warrant an assurance of reciprocal treatment in extradition. But, of course, it is for the requested State to decide for itself whether or not it is satisfied with an assurance of reciprocity."[1065]

442. With regard to the consequences of disguised extradition, the issue was raised in the case *R. v. Bow Street Magistrates, ex parte Mackeson,*[1066] in which the High Court of England examined whether it could proceed in considering the case of an alien who had been expelled from Zimbabwe, with the purpose of effecting a disguised extradition. The Court held that:

> "Whatever the reason for the applicant being at Gatwick Airport on the tarmac, whether his arrival there had been obtained by fraud or illegal means, he was there. He was subject to arrest by the police force of this country. Consequently the mere fact that his arrival there may have been procured by illegality did not in any way oust the jurisdiction of the Court."[1067]

443. Nevertheless, the Court exercised its discretion not to exercise jurisdiction over the case, as an equitable remedy.[1068]

9. Confiscatory expulsion

444. There have been cases of apparent "confiscatory expulsions" or cases in which aliens may have been expelled in order to facilitate the unlawful deprivation of their property, such as the *Nottebohm* case;[1069] the

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[1065] Ibid., pp. 14-16. "However, expulsion may under these circumstances be unlawful under municipal law. Should this be the case, as the Federal Court of Australia noted in *Schlieske v. Minister for Immigration and Ethnic Affairs,* the 'distinction [...] between a deportation for the purpose of extradition ("disguised extradition") and a deportation for immigration control purposes which incidentally effects a *de facto* extradition' may be 'difficult of practical application'." Giorgio Gaja, note 28 above, p. 299 (quoting Judgement of 8 March 1988, 84 *Australian Law Reports* 719 at 725).

[1066] *R. v. Bow Street Magistrates*, note 1060 above. In reaching its conclusion, the Court relied heavily on the findings of the Rhodesia High Court, prior to Mr. Mackeson's expulsion. See *Mackeson*, note 1060 above.

[1067] *R. v. Bow Street Magistrates*, note 1060 above, p. 343.

[1068] Ibid., pp. 336-345.

[1069] "Liechtenstein sought damages for the unlawful arrest, detention, and expulsion of Nottebohm, and the refusal to readmit him, together with more general damages for unlawful interference with and deprivation of property. Had the Court been prepared to deal with the merits of the case, it would have had to consider whether Nottebohm's expulsion and the refusal to readmit had been effected in order to expropriate his property. The fact that more than one hundred different proceedings were subsequently initiated in order to deprive Nottebohm of his proprietary interests might thus have moved the Court to consider the expelling State's underlying intentions." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 211.

expulsion of Asians by Uganda;[1070] and the expulsion of British nationals from Egypt.[1071] The lawfulness of such expulsions has been questioned from the perspective of the absence of a valid ground for expulsion[1072] as well as human rights relating to property interests discussed below.

B. Human rights considerations

445. The expulsion of aliens should be carried out in conformity with international human rights law. There are various rights which may affect the expulsion of aliens, such as (1) the rights of the family; (2) freedom of expression; (3) trade union rights; (4) property rights; and (5) the principle of non-discrimination.[1073] This enumeration is not intended to be exhaustive. Furthermore, the rights

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[1070] "[I]n certain circumstances, expulsion may well be but one aspect of something else, such as expropriation. In August 1972, President Amin of Uganda announced that he was asking Britain to take responsibility for all United Kingdom citizens of Asian origin resident in Uganda, 'because they are sabotaging the economy'. A time limit of three months was set for their departure and stringent controls were introduced to restrict the transfer of funds abroad. … The Declaration of Assets (Non-Citizen Asians) Decree 1972, signed on 4 October but made retroactive to 9 August, provided that no person leaving Uganda by reason of the earlier decree was to transfer 'any immovable property, bus company, farm, including livestock, or business to any other person'. Further provisions were made for every 'departing Asian' to declare his assets and to effect transfer of his property or business to an agent. … Although a period of three months might be considered reasonable, it was a period of widespread confiscation of personal and other property, and little or no indication had been given of any intention or willingness to pay compensation. This fact itself suggests that the expulsions were effected, in part at least, for the purposes of an unlawful expropriation." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 212-216 (citations omitted).

[1071] "The United Kingdom adopted a similar stand in regard to the property of its citizens following the expulsions from Egypt in 1956 and, in retaliation, the Government imposed exchange control restrictions on Egyptian banks in London. The issues between the parties were finally settled by agreement and, in return for the lifting of exchange control, the United Arab Republic agreed to lift sequestration measures; to return British property, with certain exceptions; and to pay £27,500,000 in full and final settlement for the property retained and for injury or damage to property incurred prior to 1959. It is clear that the intention to expropriate without compensation because it denies the essential function of expulsion, may also deny to that act the character of a bona fide exercise of discretion." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 216 (citations omitted).

[1072] "If the purpose of the deportation or expulsion is actually to deprive the alien, without adequate compensation, of the enjoyment of his property, profession, or occupation, the resulting deprivation of property or period of readjustment would constitute a violation of Article 10 or 11, as the case might be." Louis B. Sohn, and R. R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", *American Journal of International Law*, vol. 55, 1961, pp. 545-584, at p. 566 (referring to Draft Convention on the International Responsibility of States for Injuries to Aliens, including articles 10 (Taking and Deprivation of Use or Enjoyment of Property) and 11 (Deprivation of Means of Livelihood) prepared by the authors). Attention may also be drawn to article 11, paragraph 2 (b), of the Draft Convention on the International Responsibility of States for injuries to aliens, prepared by the Harvard Law School in 1969, which prohibits expulsion when it is intended to deprive and alien of his or her livelihood. This document is reproduced in the First report on State responsibility of the Special Rapporteur, Roberto Ago, 1961, *Yearbook of the International Law Commission,* 1969, vol. II, A/CN.4/217, Annex VII, p.142.

[1073] "[T]he right to expel or deport, like the right to refuse admission, must be exercised in conformity with generally accepted principles of international law, especially international human rights law, both substantive which are relevant to the consideration of the expulsion of an alien may vary depending on the facts and circumstances of a particular case. Moreover, States may restrict certain human rights guarantees under specified conditions or derogate from some human rights in special circumstances to the extent permissible under international human rights law.

1. The rights of the family

446. The principle of family unity has been recognized in a number of international and regional instruments, including the 1948 Universal Declaration of Human Rights;[1074] the International Covenant on Civil and Political Rights;[1075] the International Covenant on Economic, Social and Cultural Rights;[1076] the Convention on the Rights of the Child;[1077] the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;[1078] as well as the

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and procedural ..." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 89. "The principle of good faith and the requirement of justification demand that due consideration be given to the interests of the individual, including his basic human rights ..." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 308. "An expulsion encroaching upon the human rights protected by the International Covenant on Civil and Political Rights of 1966 or a regional instrument such as the European Convention on Human Rights of 1950 might be unlawful for the respective signatory State." Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 104. "The right to expel, however, may be restricted by international treaties protecting human rights (e.g. United Nations Covenant on Civil and Political Rights, Art. 12(4); Protocol No. 4 to the European Convention on Human Rights, Art. 3), and these principles may in the future also influence customary international law." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* vol. 1, 1992, pp. 109-112, at p. 111.

[1074] Article 16(3): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." "This provision has been incorporated, word for word, in Article 23(1) of the 1966 International Covenant on Civil and Political Rights and in Article 17(1) of the 1969 American Convention of Human Rights. In addition, both Article 12 of the Declaration and Article 17 of the Covenant provide, *inter alia,* that no one shall be subjected to arbitrary ('or unlawful,' as added in the Covenant) interference with his family; and that everyone has the right to the protection of the law against such interferences." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 65-66.

[1075] Article 23, para. 1: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

[1076] Article 10: "The States Parties to the present Covenant recognize that: (1) The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."

[1077] Article 9, para. 1: "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."

[1078] *See* Part X.C.2(b)(i).

European Convention on Human Rights;[1079] the American Convention on Human Rights;[1080] and the African Charter of Human and Peoples' Rights.[1081]

447. The right to family unity is not explicitly recognized in international or regional instruments. The view has nonetheless been expressed that the right to family unity or the right of a family to live together is recognized as a matter of international law.[1082]

> "A few words about terminology may be useful. The right to family unity is not expressed as such in international instruments. Family unity is the term generally used to describe the totality of the interlocking rights enumerated below, and covers, in the migration context, issues related to admission, stay, and expulsion. Family unity also indicates a more specific meaning relating to constraints on state discretion to separate an existing intact family through the expulsion of one of its members. … A family's right to live together is protected by international law. There is universal consensus that, as the fundamental unit of society, the family is entitled to respect, protection, assistance, and support. A right to family unity is inherent in recognizing the family as a group unit. The right to marry and found a family also includes the right to maintain a family life together."[1083]

[1079] Article 8: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[1080] Article 17, para. 1: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

[1081] Article 18: "1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral. 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community."

[1082] "The right to family unity is widely recognized in international and regional human rights instruments. As the 'fundamental group unit' in society, the family is entitled to protection and support. … Family unity rights pertain to non-nationals as well as nationals. … Expulsion measures may also threaten to separate families." Alexander T. Aleinikoff, "International Legal Norms and Migration: A Report" *in* Alexander T. Aleinikoff, and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 1-27, at p. 17.

[1083] Kate Jastram, "Family Unity" in Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 185-201, at p. 183, n. 2 (citing Universal Declaration on Human Rights, 1948, article 16, para. 3; International Covenant on Civil and Political Rights, 1966, article 23, para. 1; International Covenant on Economic, Social and Cultural Rights, 1966, article 10, para. 1; American Convention on Human Rights, 1969, article 17, para. 1; African Charter on Human and Peoples' Rights, 1981, article 18(1)(2); African Charter on the Rights and Welfare of the Child, 1990, article XVIII(l); Revised European Social Charter, 1996, article 16, as well as Convention on the Rights of the Child, 1989, 5th preambular paragraph) and n. 3 (citing Universal Declaration on Human Rights, 1948, art. 16, para. 1; European

448. The right of family unity has been considered fairly extensively in the context of the expulsion of aliens.[1084]

> "The right of a family to stay together has been more fully developed in expulsion cases. Thus, the Human Rights Committee, in a case raising a claim that the deportation of an immigrant was inconsistent with Article 17 of the ICCPR (prohibiting arbitrary interference with privacy, family, or home), considered whether the threatened impact on the family would be disproportionate to the state's effectuation of immigration policies. Factors to be examined include the length of residence; the age of the children and the impact of expulsion of a parent; the conduct of the parent; and the state's interests in protecting public safety and promoting compliance with immigration laws. As in the admissions context, however, it has been recognized that expulsion does not necessarily destroy family unity; it may simply cause relocation of the entire family to another state."[1085]

449. The expulsion of aliens should be carried out in conformity with international human rights law concerning the rights of the family.[1086] The expulsion of an alien involving the separation of a family may require a stronger justification in terms of the interests of the State in removing this person from its territory.[1087] For example, the expulsion of an alien whose family unity is threatened

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Convention on Human Rights, 1950, article 12; International Covenant on Civil and Political Rights, 1966, article 23, para. 2; and American Convention on Human Rights, 1969, article 17, para. 2).

[1084] "International human rights jurisprudence on family unity is most fully developed thus far in the context of expulsion, where an individual will assert the right to family unity as a defense against deportation. Family unity in this regard may be seen as both a procedural right and a substantive one. As a matter of procedure, states are less free to expel a family member than a sole individual, and must consider the family interests involved. ... As a substantive matter, respect for the right to family unity requires balancing the state's interest in deporting the family member with the family's interest in remaining intact." Kate Jastram, "Family Unity" in Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 185-201, at p. 191.

[1085] Alexander T. Aleinikoff, note 119 above, p. 18.

[1086] "A further restriction to the States' power to expel individuals from their territory comes from the requirement that private and family law be respected. The corresponding protection is significant for those immigrants who have built ties with people living on the territory of the expelling State." Giorgio Gaja, note 28 above, p. 306. "Only in cases where an arbitrary expulsion and subsequent deportation would at the same time violate generally recognized human rights is there an international duty to refrain from expulsion, for example ... because, for instance, the destruction of the family ... is foreseeable which would constitute an abuse of rights." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 111. *See* also Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 284-286 and 308; and Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 65.

[1087] "In expulsion cases, the [European] Court has balanced the individual's rights against the community's interests in determining whether removal was necessary in a democratic society. This approach places a greater may be more likely when there are more serious grounds for expulsion, for example violations of criminal law rather than immigration law.[1088] The possibility of the family members accompanying the alien to the country of destination may be considered in determining the impact of the expulsion on the family unit. However, attention has been drawn to an inconsistency in the relevant practice is this regard.[1089]

450. Family unity as a relevant consideration in the expulsion of aliens has been recognized in treaty law, international jurisprudence as well as national law and jurisprudence as discussed below.

451. The Committee on the Elimination of Racial Discrimination has recommended that States parties to the International Convention on the Elimination of All Forms of Racial Discrimination

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burden of justification on states, and the Court has tended to side with non-citizens wishing to prevent family separation." Kate Jastram, "Family Unity" in Alexander T. Aleinikoff and V. Chetail (eds.), Migration and International Legal Norms, The Hague, T.M.C. Asser Press, 2003, pp. 185-201 (referring to *Boultif* v. *Switzerland,* Judgment of 2 August 2001, Appl. No. 54273/00) and n. 45 (citing *Berrehab* v. *the Netherlands,* Judgment of 21 June 1988, Appl. No. 10730/84; *Moustaquim* v. *Belgium,* Judgment of 25 January 1991, Appl. No. 12313/86).

[1088] "This line of cases under the ICCPR suggests that, particularly when expulsion is threatened for immigration violations only, as opposed to criminal law convictions, and citizen children will be affected, states will find it difficult to rely solely on their interest in immigration enforcement to justify separating an intact family." Kate Jastram, "Family Unity" in Alexander T. Aleinikoff and V. Chetail (eds.), Migration and International Legal Norms, The Hague, T.M.C. Asser Press, 2003, pp. 185-201, p. 192 (referring to the decisions of the Human Rights Committee in *Canepa* v. *Canada,* UN Doc. CCPR/C/59/D/558/1993 (20 June 1997); *Canepa and Stewart* v. *Canada,* UN Doc. CCPR/C/58/D/538/1993 (16 December 1996); and *Winata* v. *Australia,* UN. Doc. CCPR/C/72/D/930/2000 (16 August 2001). "With regard to respect for family life, the European Court of Human Rights has indicated that it will not accept at face value a state's assertion of the danger posed by a particular family member. Moreover, in order for the expulsion of a family member to be justified, it must be 'necessary,' meaning that the states' interest (for example, in preventing crime and disorder) must be motivated by a 'pressing social need' that outweighs, on balance, the affected persons' interest in family unity. Thus, the mere fact that an alien has been convicted of a crime may not be sufficient to justify deportation if the circumstances render the alien's interests in remaining particularly strong and/or the prior conviction does not necessarily demonstrate a criminal propensity." David Fisher et al., note 130 above, pp. 117-118 and nn. 233-235 (citing *Moustaquim* v. *Belgium* (1991) 13 *EHRR* 802; *Beldjoudi* v. *France* (1992) 14 *EHRR* 801 at 74; *Nasri* v. *France* (1996), 21 *EHRR* 458 at 46 and, *contra, Boughanemi* v. *France* (1996) 22 *EHRR* 228 ("holding on balance that conviction carrying a sentence of four years imprisonment was sufficiently serious to outweigh a deportees' right to respect for family").

[1089] "Unlike the European Court of Human Rights, the Human Rights Committee does not seem to determine, in a first step, whether the family could follow the expellee to his country of origin before it determines the applicability of the provision. If there are family ties in the country of sojourn, it easily accepts that expulsion or deportation would interfere with family life. In the light of the many problems caused by the European approach this has to be welcomed. It is, however, too early to determine how this approach will develop in cases that are more complex than those decided thus far." Walter Kälin, note 277 above, pp. 153-154 (citations omitted).

"[a]void expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life".[1090]

452. There is extensive State practice on the unity of the family as a relevant consideration in the expulsion of aliens within the framework of European institutions.

453. Article 3, paragraph 1, of the European Convention on Establishment contains a provision which allows a State Party to expel a national of another State Party lawfully residing in the territory of the former, for grounds of *ordre public* and national security. Section III b of the Protocol to this convention, which refers *inter alia* to article 3 of the Convention, provides:

> "The Contracting Parties undertake, in the exercise of their established rights, to pay due regard to family ties."

454. Section III c of the same Protocol also stresses the duty for the Contracting Parties to take into consideration family ties in the exercise of their right of expulsion:

> "The right of expulsion may be exercised only in individual cases. The Contracting Parties shall, in exercising their right of expulsion, act with consideration, having regard to the particular relations which exist between the members of the Council of Europe. They shall in particular take due account of family ties and the period of residence in their territory of the person concerned."

455. Article 8 of the European Convention on Human Rights provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

456. Based on this provision, there is a consistent jurisprudence of the European Court of Human Rights dealing with family rights in relation to the expulsion of aliens. In several cases where an expulsion interfered with family life, the European Court of Human Rights examined whether the expulsion was "necessary in a democratic society" in the interests provided for in article 8, paragraph 2, of the European Convention on Human Rights.

[1090] Committee on the Elimination of Racial Discrimination, General recommendation No. 30: Discrimination against Non-Citizens, 64th session, 23 February-12 March 2004, CERD/C/64/Misc.11/rev.3, para. 28.

457. In the *Case of Moustaquim v. Belgium*, the Court found that the deportation of Mr. Moustaquim was not "necessary in a democratic society".[1091] Given the circumstances of the case, in particular the long period of time in which Mr. Moustaquim had resided in Belgium, the ties of his close relatives with Belgium as well as the relatively long interval between the latest offence committed by Mr. Moustaquim and the deportation order, the Court came to the conclusion that the measure was not "necessary in a democratic society" since "a proper balance was not achieved between the interests involved, and […] the means employed was therefore disproportionate to the legitimate aim pursued".[1092] Accordingly, the Court held that there had been a violation of article 8 of the European Convention on Human Rights.

458. Similarly, in the *Case of Nasri v. France*, the Court paid due consideration to the physical and social conditions of the claimant, including his family ties. Given that the majority of his family members were French nationals with no close ties with Algeria, the Court held that the expulsion of the claimant from France was not "necessary in a democratic society", in spite of a conviction for rape.

> "In view of this accumulation of special circumstances, notably his situation as a deaf and dumb person, capable of achieving a minimum social equilibrium only within his family, the majority of whose members are French nationals with no close ties with Algeria, the decision to deport the applicant, if executed, would not be proportionate to the legitimate aim pursued. It would infringe the right to respect for family life and therefore constitute a breach of Article 8."[1093]

459. In contrast, in other cases the Court found that the expelling State had not violated article 8 of the European Convention on Human Rights. One of the factors taken into account by the Court has been the possibility for the alien expelled to establish family ties in his or her country of origin. In the *Case of Cruz Varas and Others v. Sweden*, the Court held that "the evidence adduced [did] not show that there were obstacles to establishing family life in their home country".[1094]

[1091] European Court of Human Rights, *Case of Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, Application number 12313/86, paras. 41-46.

[1092] Ibid., para. 46. *See* also *Case of Berrehab v. The Netherlands*, Judgment, 21 June 1988, Application number 10730/84, paras. 19-29.

[1093] European Court of Human Rights, *Case of Nasri v. France*, Judgment (Merits and Just Satisfaction), 13 July 1995, Application number 19465/92, para. 46.

[1094] European Court of Human Rights, *Case of Cruz Varas and Others v. Sweden*, Judgment (Merits), 20 March 1991, Application number 15576/89, para. 88. *See* also *Case of C. v. Belgium*, Judgment (Merits), 7 August 1996, Application number 21794/93, paras. 32-36. Having regard to the important links preserved by the applicant with his country of origin and to the seriousness of the offences committed against drugs laws, the Court held that there was "[…] nothing to indicate that the Belgian authorities acted in an arbitrary or unreasonable manner, or failed to fulfil their obligation to strike a fair balance between the relevant interests. The applicant's expulsion cannot be regarded as disproportionate to the legitimate aim pursued".

460. In more general terms, the Court set forth, in the *Case of Boultif v. Switzerland*, a list of criteria to be applied in order to determine whether the interference in family life resulting from an expulsion is "necessary in a democratic society". Such criteria include the nature and the seriousness of the offence committed by the applicant, the duration of the applicant's stay in the territory of the State, the time at which the offence was committed as well as many different factors relating to the family ties of the applicant, including children:

> "The Court has only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or the children to live in the other's country of origin. It is therefore called upon to establish guiding principles in order to examine whether the measure in question was necessary in a democratic society.
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> "In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion."[1095]

461. The Committee of Ministers of the Council of Europe, in its recommendation No. (2002)4, stressed the need for proper examination of different criteria, such as the person's place of birth, age of entry on the territory, length of residence, family situation and ties with the country of origin when considering the expulsion of a family member.

> "1. When considering the withdrawal, refusal to renew a residence permit or the expulsion of a family member, member states should have the proper regard to criteria such as the person's place of birth, his age of entry on the territory, the length of residence, his family relationships, the existence of family ties in the country of origin and the solidity of social and cultural ties with the country of origin."[1096]

[1095] European Court of Human Rights, *Case of Boultif v. Switzerland*, Judgment (Merits and Just Satisfaction), 2 August 2001, Application number 54273/00, para. 48.

[1096] Council of Europe, Committee of Ministers, Recommendation No. Rec (2002) 4 of the Committee of Ministers to Member States on the legal status of persons admitted for family reunification, 26 March 2002. "IV. Effective protection against expulsion of family members".

462. Factors relating to family life are also taken into consideration in the relevant legislation of the European Union with respect to the adoption of an expulsion against a citizen of the Union. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 includes family ties as a factor to be considered in the expulsion of a Union citizen. Preambular paragraph 23 of the directive states as follows:

> "Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin."[1097]

Similarly, preambular paragraph 24 indicates:

> "Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life."

463. Article 28, paragraph 1, of the same directive then enumerates the family situation of the person concerned among the criteria to be examined before expelling a citizen of the Union:

> "1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin."

464. The European Union also provides for the consideration of the family in the expulsion of third country nationals who are long-term residents.[1098]

465. The extent to which family unity may be recognized as a limitation on the expulsion of aliens in other regions of the world is less clear in the absence of similar extensive State practice.[1099]

[1097] Corrigendum to Directive 2004/38/EC, note 745 above.

[1098] See European Union, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, *Official Journal L 16*, pp. 44-53, art. 12, para. 3.

[1099] "Recent years have seen rapid development of case law considering whether or to what extent explicit human rights norms relating to the family now constrain admission and expulsion decisions. The most extensive

466. The national laws of some States recognize that family considerations may be a limiting factor in the expulsion of aliens. A State may require that the principle of family unity be respected with respect to aliens,[1100] or that infringements of the alien's family life be minimized or considered by the relevant authorities.[1101] A State may allow an alien otherwise subject to expulsion or refusal of entry to remain in the State on an exceptional basis for purposes of family reunion.[1102] A State may also restrict or prohibit the expulsion of minors,[1103] pregnant women or women with very young infants,[1104] family members or others under the alien's charge,[1105] battered spouses or children,[1106] or

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protections of this sort have developed under Article 8 of the European Convention for Human Rights (ECHR), which protects a person's right to privacy, home, and family life. Several decisions of the European Court of Human Rights have applied this provision to forbid the expulsion of long time alien residents (usually, but not always, individuals who first took up residence as children), even though the basis for the proposed expulsion was the commission of serious crimes. State practice outside Europe, however, is far more accepting of the expulsion of long time residents on the basis of crimes, even over objections based on family rights; and the UN Human Rights Committee has upheld such expulsions over claims based on the comparable provisions of the International Covenant on Civil and Political Rights (ICCPR). Later trends in the Human Rights Committee, however, may reflect a less deferential application of Covenant norms to expulsion. But the Committee's practice remains rather undeveloped - it has had only a limited number of communications in this realm – and, in any event, the Committee has not been given the authority to provide binding interpretations of the Covenant. The ultimate test may prove to be the actual practice of states that are party to the Covenant. It remains far from certain that, outside Europe, state practice will yield so substantially to family protections in such cases." Martin, David A., "The Authority and Responsibility of States" *in* Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 31-45, at p. 36 (citations omitted).

[1100] Australia, 1958 Act, articles 199, 205; Czech Republic, 1999 Act, section 61(2); Italy, 1998 Decree-Law No. 286, articles 26-27, 1996 Decree Law, article 10; Paraguay, 1996 Law, article 7(1); and United States, INA, section 212(a)(6)(E)(ii), (9)(B)(iii)(III).

[1101] Austria, 2005 Act, articles 3.46(4), 3.54(3)-(4); Canada, 2001 Act, articles 63(1)-(2), 65; Czech Republic, 1999 Act, section 9(3); Sweden, 1989 Act, section 4.10; and Switzerland, 1931 Federal Law, article 16(3). Such restraint can expressly apply to the family's deportation (Austria, 2005 Act, articles 3.46(4), 3.79(3)).

[1102] Argentina, 2004 Act, article 29; *compare* Malaysia, 1959-1963 Act, articles 8(3)(n), 9(6); and United Kingdom, 1999 Act, section 10(c), 1971 Act, sections 3(5)(b) (as amended by the Immigration and Asylum Act 1999, section 169(1), Sch. 14, paras. 43, 44(2)), 5(3)-(4), which permit the expulsion of a family member when another member has been expelled.

[1103] France, Code, article L511-4(1), L521-4; Italy, 1998 Decree-Law No. 286, article 19(2)(a), 1998 Law No. 40, article 17(2)(a), 1996 Decree Law, article 7(3); Poland, 2003 Act No. 1775, article 94(1)-(2); Sweden, 1989 Act, sections 1.1, 11.1a, 4.10, 7.5; Switzerland, 1949 Regulation, article 16(6); United Kingdom, 1971 Act, section 7(3)(6) (as amended by the Immigration and Asylum Act 1999, section 169(1), Sch. 14, paras. 43, 44(2)); and United States, INA, section 212(a)(9)(B)(iii)(I).

[1104] Italy, 1998 Decree-Law No. 286, article 19(2)(d), 1998 Law No. 40, article 17(2)(d); and Spain, 2000 Law, article 57(6).

[1105] Spain, 2000 Law, article 57(6); and United States, INA, section 212(a)(10)(B).

[1106] United States, INA, sections 212(a)(6)(A)(ii), (9)(B)(iii)(IV), 240A(b)(2), (4).

an alien with family ties to nationals or residents of the State.[1107] However, in some countries, a polygamist may not enjoy rights under this heading, and may also be subject to expulsion or refusal of entry for engaging in that practice.[1108]

467. The national courts of some States have also taken into account family considerations in a number of expulsion cases.[1109] In some cases, courts have balanced the interest of the family against the other interests of the State.[1110] In deciding whether an expulsion constituted a violation of the

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[1107] Argentina, 2004 Act, articles 62, 70; France, Code, articles L511-4(6)-(8); L521-2(1)-(2), L521-3(3)-(4); Italy, 1998 Decree-Law No. 286, article 19(2)(c), 1998 Law No. 40, article 17(2)(c), 1996 Decree Law, article 7(3); Paraguay, 1996 Law, articles 7(1), 35(b), 82; Portugal, 1998 Decree-Law, article 108; and United States, INA, sections 212(a)(3)(D)(iv), (4)(B)(III), (C)(i)(I), (9)(B)(v), 240A(b)(1)(D). A minimum length of residence in the State's territory may be required of the alien for this restriction to apply (Paraguay, 1996 Law, article 82(b); and Spain, 2000 Law, article 57(6)).

[1108] France, Code, articles L511-4(6), (8); L521-2(1), L521-3(3)-(4); and United States, INA, section 212(a)(10)(A).

[1109] See *Re Ratzlaff*, Belgian State, Cour de Cassation, 21 September 1959, *International Law Reports*, volume 47, 1974, E. Lauterpacht (ed.), pp. 263-264; *Cazier v. Belgian State (Minister of Justice)*, Conseil d'État, 13 July 1953, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 335-336; *K. A. v. State of the Netherlands*, District Court of the Hague, 12 July 1979, *International Law Reports*, volume 74, E. Lauterpacht, C.J. Greenwood (eds.), pp. 444-448; *Deportation to U. Case*, note 900 above; *In Re Paul B*, Federal Republic of Germany, Federal Constitutional Court (Supreme Senate), 1 March 1966, *International Law Reports*, volume 45, E. Lauterpacht (ed.), pp. 371-376; *Expulsion Order Case*, Federal Republic of Germany, Supreme Administrative Court of Hesse, 13 November 1968, *International Law Reports*, volume 61, E. Lauterpacht (ed.), C.J. Greenwood, pp. 436-443; *Expulsion of Alien Case*, Federal Republic of Germany, Administrative Court of Appeals of Bavaria, 12 January 1966, *International Law Reports*, volume 57, E. Lauterpacht, C.J. Greenwood (eds.), pp. 313-315; *Residence Prohibition Order Case (1)*, Federal Republic of Germany, Superior Administrative Court of Münster, 24 September 1968, *International Law Reports*, volume 61, E. Lauterpacht, C.J. Greenwood (ed.), pp. 431-433; *Expulsion of Alien (Germany) Case*, Federal Republic of Germany, Federal Administrative Supreme Court, 25 October 1956, *International Law Reports*, 1956, H. Lauterpacht (ed.), pp. 393-395; *Expulsion of Foreign National (Germany) Case*, Federal Republic of Germany, Administrative Court of Appeal of the Land of North Rhine-Westphalia, 16 May 1961, *International Law Reports*, volume 32, E. Lauterpacht (ed.), pp. 255-257; *In re Barahona*, Supreme Court of Costa Rica, 10 August 1939, *Annual Digest and Reports of Public International Law Cases*, 1938-1940, H. Lauterpacht (ed.), Case No. 138, pp. 386-388; *Louie Yuet Sun v. The Queen*, Canada, Ontario High Court of Justice, 22 March 1960, Supreme Court, 28 November 1960, *International Law Reports*, volume 32, E. Lauterpacht (ed.), pp. 252-255; *Seyoum Faisa Joseph v. U.S. Immigration & Naturalization Service*, U.S Court of Appeals, Fourth Circuit, 20 May 1993, No. 92-1641; *Fernandes v. Secretary of State for the Home Department*, Court of Appeal of England, 20 November 1980, *International Law Reports*, volume 78, E. Lauterpacht, C.J. Greenwood (eds.), pp. 371-378; *Harisiades v. Shaughnessy*, Court of Appeals, Second Circuit, 6 February 1951, *International Law Reports*, 1952, H. Lauterpacht (ed.), Case No. 69, pp. 345-350 (expelled despite having a wife and children who were citizens).

[1110] See, e.g., *Re Ratzlaff*, Belgium, Conseil d'État, 21 September 1959; *Cazier v. Belgian State (Minister of Justice)*, Belgium, Conseil d'Etat, 13 July 1953 "Article 8 [of the European Convention on Human Rights], referred to in the appeal, allows the State to interfere with a person's enjoyment of his right to have his family life respected when such interference is provided for by the law, and constitutes notably a measure necessary, in a democratic society, for the preservation of public safety or the protection of law and order." *Re Ratzlaff*, Belgium, Cour de Cassation, 21 September 1959, *International Law Reports*, volume 47, 1974, E. Lauterpacht (ed.), pp. 263-264, at p. 264. "But the protection of the marriage of an alien does not enjoy absolute precedence over the general public interest which may be served by an expulsion or deportation. Bearing in mind the rights of the family, courts have looked to such factors as the nationality of the other family members,[1111] the likelihood that the family could live together outside the territorial State,[1112] and the expectations of the parties to the marriage.[1113]

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seriousness of the criminal offences committed by the plaintiff and the danger which he continues to represent, as demonstrated by his subsequent conduct in prison, the public interest and the duty of the State to safeguard the security of its citizens must prevail over the interest which the State also has in the integrity of marriage." *Deportation to U. Case*, note 900 above, p. 617; "In considering these questions, the extent to which the public interest would be served by the immediate removal of the punishable alien from the Federal Republic has to be weighed against the concern that his family should be kept together and its existence not be jeopardized." *In Re Paul B*, Federal Republic of Germany, Federal Constitutional Court (Supreme Senate), 1 March 1966, *International Law Reports*, volume 45, E. Lauterpacht (ed.), pp. 371-376, at p. 373; "... expulsion constitutes a violation of this principle only in cases where its practical consequences are of such a grave nature with respect to the marriage and the family that they outweigh the reasons for the expulsion" *Expulsion Order Case*, Federal Republic of Germany, Supreme Administrative Court of Hesse, 13 November 1968, *International Law Reports*, volume 61, E. Lauterpacht (ed.), C.J. Greenwood, pp. 436-443, at p. 442; "On the other hand the State is not only obliged to protect the family, it equally has a duty to maintain public order and security. These two obligations must be well balanced." *Expulsion of Alien Case*, Federal Republic of Germany, Administrative Court of Appeals of Bavaria, 12 January 1966, *International Law Reports*, volume 57, E. Lauterpacht, C.J. Greenwood (eds.), pp. 313-315, at p. 314; "If the unity and integrity of the family are threatened, the interests of family protection must be taken into account and set against other public interests." *Expulsion of Alien (Germany) Case*, Federal Republic of Germany, Federal Administrative Supreme Court, 25 October 1956, *International Law Reports*, 1956, H. Lauterpacht (ed.), pp. 393-395, at p. 394. With respect to families without children, in the *Expulsion of Alien Case*, Administrative Court of Appeals of Bavaria, 12 January 1966, it was indicated that "the same principles can be applied because the family is entitled to State protection whether there are children or not."

[1111] It is in particular relevant if other members of the family are nationals of the territorial State. See, e.g., "... the special position of the complainant, who is married to a Belgian national and with whom he has had a child born in Belgium during his residence in the country, placed upon the Administration a duty to take particular care to justify the expulsion." *Cazier v. Belgian State (Minister of Justice)*, Conseil d'État, 13 July 1953, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 335-336, at p. 336. A particular case arises when a child is born to an alien in the territorial State, thereby acquiring its nationality. See *Louie Yuet Sun v. The Queen*, Supreme Court of Canada, note 1109 above (mother can be expelled); *In re Keibel et al.*, Supreme Court of Costa Rica, 1 June 1939 (The court held that as the child could not be expelled and would need its mother, the mother could also not be expelled).

[1112] See *Residence Prohibition Order Case (1)*, Federal Republic of Germany, Superior Administrative Court of Münster, 24 September 1968, *International Law Reports*, volume 61, E. Lauterpacht, C.J. Greenwood (ed.), pp. 431-433, at p. 432 "Although, under Article 8 of the European Convention on Human Rights and Article 6 of the Basic Law, marriage and the family are to be protected from interference by the State, these provisions do not apply where the foreigner's wife and family can be expected to live outside Germany.". "In particular, it must give due consideration to the consequences which an immediate expulsion would have for his second wife, who has retained her German nationality though marrying an alien and is therefore fully entitled to the protection of the Federal Republic; it must also consider the consequences for his relations with the children of his first marriage, now living in the Federal Republic; and finally, it must consider the consequences for his second wife's children from *her* first marriage, none of whom possess Swiss citizenship." *In Re Paul B*, Federal Republic of Germany, Federal Constitutional Court (Supreme Senate), 1 March 1966, *International Law Reports*, volume 45, E. Lauterpacht (ed.), pp. 371-376, at p. 375. "If the appellant chooses to take the child with her, the material indicates that the Hong Kong authorities are willing to receive her and the child." *Louie Yuet Sun v. The Queen*, note 1109 above, p. 254.

[1113] In particular, courts have looked to whether the expulsion was foreseeable or already ordered at the time of the wedding. See *Expulsion Order Case*, Federal Republic of Germany, Supreme Administrative Court of Hesse,

2. The rights of the child

468. The expulsion of aliens should be carried out in conformity with international human rights law concerning the rights of the child.[1114] The expulsion of an alien which raises the question of the separation of a family involving a child may require consideration of the best interests of the child under the Convention on the Rights of the Child (CRC).[1115]

469. There may substantive as well as procedural aspects to ensuring the rights of the child.[1116] The substantive content of the phrase "best interests of the child" is not clearly defined in the Convention but may be ascertained to some extent by consideration of relevant provisions.

"The substantive content of the best interests principle is not defined in the CRC. Nevertheless, certain elements emerge from other provisions of the Convention. In the case of

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13 November 1968, *International Law Reports*, volume 61, E. Lauterpacht (ed.), C.J. Greenwood, pp. 436-443, at p. 442 "Moreover the plaintiff's new wife married him knowing that the plaintiff was the subject of an expulsion order. Therefore she was fully aware of the consequences which might result from her husband's expulsion.". *Deportation to U. Case*, note 900 above. "We do not construe § 212.5 as creating a public interest in paroling stowaways into the United States, particularly stowaways who marry United States citizens after their asylum requests have been denied and after a deportation order has issued." *Seyoum Faisa Joseph v. U.S. Immigration & Naturalization Service*, U.S Court of Appeals, Fourth Circuit, 20 May 1993, No. 92-1641. *But see In Re Paul B,* Federal Republic of Germany, Federal Constitutional Court (Supreme Senate), 1 March 1966, *International Law Reports*, volume 45, E. Lauterpacht (ed.), pp. 371-376, at p. 375 "The marriage and family of the complainant are lasting institutions and have the force of a fundamental right, irrespective of whether they were established before or, as here, after the issue of the residence prohibition and the order for its immediate enforcement. Furthermore, no decisive importance can be attached to the fact that the complainant and his spouse knew about the residence prohibition and the order for its immediate enforcement at the time of their marriage. It has not been established that the marriage was concluded for the sole purpose of avoiding the residence prohibition."

[1114] "Furthermore, under the Convention on the Rights of the Child (CRC), a child may be separated from his or her family only when competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child. […] The Convention on the Rights of the Child appears to apply a stricter standard, permitting family separation only when it is in the best interests of the child.67 Thus, where expulsion would in fact result in family separation - because of practical relocation and adaptation difficulties - states would have an obligation under the CRC to hear from the child (or his or her representative) and determine whether the expulsion of the parent is in the child's best interest." Alexander T. Aleinikoff, note 119 above, pp. 17-18 (referring to article 9 of the Convention).

[1115] Convention on the Rights of the Child, New York, 20 November 1989, United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3. "In assessing family unity cases involving children states must also take into account the best interests of the child. States seeking to separate families through deportation face significant constraints in the Convention on the Rights of the Child (CRC), which requires in Article 9 that states '*shall* ensure that a child *shall* not be separated from his or her parents against their will, except when ... such separation is *necessary for the best interests of the child.*'" Kate Jastram, "Family Unity" in Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 185-201, at p. 192 (emphasis added by author).

[1116] "There are procedural and substantive aspects to the best interests requirement." Ibid., p. 192.

actions and decisions affecting an individual child, it is the best interests of that individual child that must be taken into account. It is in the child's best interests to enjoy the rights and freedoms set out in the CRC, such as contact with both parents (in most circumstances). Best interests must be determined on a case-by-case basis, taking into account the totality of the circumstances. The Committee on the Rights of the Child has, for example, urged states to take the principle into 'full consideration' and to 'consider the full implications' of it. In this regard, it should be noted that CRC Article 12 mandates that the views of the child shall be heard 'in any judicial and administrative proceedings affecting the child' and be given due weight in accordance with his or her age and maturity. It is certainly not always in the best interests of the child to remain with parents, as recognized in CRC Article 9. However, it should be noted that in sharp contrast to the ICCPR, which prohibits only 'arbitrary and unlawful' interference with the family, the CRC does not recognize a public interest to be weighed against the involuntary separation of the family. The only exception allowed is when separation is necessary for the best interests of the child."[1117]

470. Thus, the consideration of the rights of the child in relation to the expulsion of an alien may involve a higher standard than the right to family unity in general.[1118] The additional procedural aspect of ensuring compliance with the rights of the child involves the process for ensuring that the 'best interests" of the child are taken into account.[1119] It has been suggested that the best interests principle has attained the status of customary international law.[1120]

[1117] Ibid., p. 193 (citations omitted) (quoting Concluding observations of the Committee on the Rights of the Child: Finland, UN Doc. CRC/C/15/Add. 132 (16 October 2000), paras. 25-26).

[1118] "'Thus, a competent state authority may decide to deport a parent in accordance with municipal law for carefully weighed and relevant reasons, yet the separation of the child from the parent may violate the state's obligations and the child's right to family unity under article 9.'" Ibid., p. 193, n. 43 (quoting E.F. Abram, "The Child's Right to Family Unity in International Immigration Law," 17(4) *Law and Policy* (1995), p. 407).

[1119] "The Committee on the Rights of the Child's insistence on the procedural aspect is emphasized in its concluding observations on Norway. The Committee observed that 'when decisions to deport foreigners convicted of a criminal offense are taken, *professional opinions* on the impact of such decisions upon the children of the deported persons are not *systematically* referred to and taken into consideration. ... [The Committee recommended that Norway] review the *process* through which deportation decisions are made to ensure that where deportation will mean the separation of a child from his or her parent, the best interests of the child are taken into consideration.'" Ibid., pp. 192-193 (quoting Concluding observations of the Committee on the Rights of the Child: Norway, UN Doc. CRC/C/15/Add. 126 (28 June 2000), paras. 30-31) (Author's emphasis added).

[1120] "It has been held that the best interests principle has attained the status of customary international law. In addition to near-universal adherence to the binding provisions of the CRC, state practice with respect to the right to family unity is regularly confirmed by the Commission on Human Rights." Ibid., p. 193 and n. 39 (referring to "*Beharry* v. *Reno,* 183 F.Supp. 2d 584 (E.D.N.Y.), wherein a federal district court in the United States, which is not a State Party to the Convention on the Rights of the Child, ruled that the government must take into account customary international law principles regarding the best interests of the child in the case of an immigrant man slated for deportation for a criminal offense, who is also the father of a seven-year-old U.S.

471. The Committee on the Rights of the Child has expressed its concern about the impact of an expulsion on the children of the expelled person on a number of occasions.[1121]

472. The Committee of Ministers of the Council of Europe, in its recommendation No. (2002) 4, indicated that, when considering the expulsion of a family member:

> "Special consideration should be paid to the best interest and wellbeing of children."[1122]

473. Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 concerning Union citizens provides that minors may only be expelled in exceptional circumstances in accordance with the Convention on the Rights of the Child. The preamble to the Directive states as follows:

> "Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989."[1123]

474. Article 28, paragraph 3 (b), of the same directive limits the right to expel a minor child as follows:

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citizen daughter") and n. 40 ("Commission on Human Rights Resolutions 2001/75 on the Rights of the Child, UN Doc. E/CN.4/RES/2001/75, para. ll(c), and 2000/85 on the Rights of the Child, UN Doc. E/CN.4/RES/2000/85, para. 15(d). UNHCR's Executive Committee has also expressed its concern over the serious consequences of expulsion on family members of refugees, Executive Committee Conclusion No. 7 (XXVIII) 1977(b).")

[1121] "The Committee recognizes the efforts made by Canada for many years in accepting a large number of refugees and immigrants. […] The Committee specifically regrets the delays in dealing with reunification of the family in cases where one or more members of the family have been considered eligible for refugee status in Canada as well as cases where refugee or immigrant children born in Canada may be separated from their parents facing a deportation order." Concluding observations of the Committee on the Rights of the Child: Canada, 9 June 1995, CRC/C/15/Add.37 (20 June 1995), para. 13. "30. […] The Committee is further concerned that despite the State party's positive efforts, when decisions to deport foreigners convicted of a criminal offence are taken, professional opinions on the impact of such decisions upon the children of the deported persons are not systematically referred to and taken into consideration. 31. […] The Committee also recommends that the State party review the process through which deportation decisions are made to ensure that where deportation will mean the separation of a child from his or her parent, the best interests of the child are taken into consideration." Concluding observations of the Committee on the Rights of the Child: Norway, 2 June 2000, CRC/C/15/Add.126 (28 June 2000), paras. 30-31.

[1122] Council of Europe, note 296 above.

[1123] Corrigendum to Directive 2004/38/EC, note 745 above, preambular paragraph 14.

> "3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they: […] (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

3. Freedom of expression

475. Freedom of expression has been recognized in a number of international and regional instruments, including the International Covenant on Civil and Political Rights;[1124] the European Convention on Human Rights;[1125] the American Convention on Human Rights;[1126] and the African Charter of Human and Peoples' Rights.[1127]

[1124] Article 19: "1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals."

[1125] Article 10: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[1126] Article 13: "1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals. 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence. 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

[1127] Article 9: "1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law."

476. The expulsion of aliens should be carried out in conformity with international human rights law concerning freedom of expression. In the *Case of Piermont v. France*, the European Court of Human Rights considered that the expulsion of the applicant from French Polynesia had been a violation of her freedom of expression guaranteed by article 10 of the European Convention on Human Rights. The expulsion was ordered as a reaction to the applicant's participation in a political debate and her denunciation of the continuation of nuclear testing and the French presence in the Pacific. Given the circumstances of the case, namely the peaceful and authorized character of the demonstration and the fact that the latter did not provoke any disorder, the Court reached the conclusion that "[a] fair balance was accordingly not struck between, on the one hand, the public interest requiring the prevention of disorder and, on the other, Mrs. Piermont's freedom of expression".[1128]

4. Trade union rights

477. Trade union rights are recognized in several conventions adopted within the framework of the International Labour Organization.[1129]

478. The Committee on Freedom of Association of the International Labour Organization has pointed out that the expulsion of a trade union leader for reasons related to activities performed in the exercise of his or her functions would be contrary to human rights and also constitute an interference in the activities of the organization to which the individual belongs:

> "The expulsion of trade union leaders from their county (cf. French text: 'du pays dans lequel ils vivent') for activities connected with the exercise of their functions is not only contrary to human rights but is, furthermore, an interference in the activities of the organization to which they belong".[1130]

5. Property rights

479. The right to property has been recognized in human rights treaties such as the American Convention on Human Rights,[1131] the African Charter of Human and People's Rights[1132] and the first Protocol to the European Convention on Human Rights.[1133]

[1128] European Court of Human Rights, *Case of Piermont v. France*, Judgment (Merits and Just Satisfaction), 27 April 1995, Application numbers 15773/89 and 15774/89, para. 77.

[1129] *See*, in particular, Convention concerning Freedom of Association and Protection of the Right to Organise (C87), San Francisco, 9 July 1948, and Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (C98), Geneva, 1 July 1949.

[1130] International Labour Organization, Committee on Freedom of Association, *Digest of Decisions 1996*, para. 127.

[1131] Article 21 – Right to Property: "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law."

[1132] Article 14: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

[1133] Protocol No. 1 to the European Convention on Human Rights, Paris, 20 March 1952, United Nations, *Treaty Series*, vol. 213, No. 2889, Article 1, p. 262: "Protection of property – Every natural or legal person is entitled to

480. The expulsion of aliens should be carried out in conformity with international human rights law governing the property rights and other economic interests of aliens. The expulsion of an alien which involves the unlawful confiscation,[1134] destruction or expropriation[1135] of property may constitute an unlawful expulsion.[1136] The unlawful taking of property may be viewed as inconsistent with the purpose[1137] and the function[1138] of expulsion. In this connection, attention may be drawn to

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the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[1134] "When taxation becomes confiscatory, it becomes illegal. In like manner, it is reasonable to conclude that where expulsion becomes confiscatory, it also becomes illegal." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 217.

[1135] "According to the *Hollander* case, an alien should not be expelled without being given the opportunity to make arrangements for his family and business. ... It does not seem that the *Hollander* case must be interpreted to mean that there is a rule of international customary law stating that the property of expellees may not be expropriated, or that dispositions of property undertaken by them may not be retrospectively invalidated." Vishnu D. Sharma and F. Wooldridge, note 579 above, p. 412 (citing *Hollanders* case, *U.S.* v. *Guatemala*, IV *Moore's Digest* 102).

[1136] "The principle that an expulsion must be carried out in a manner least injurious to the person affected has been enunciated on several occasions by international tribunals. Thus, summary expulsions, by which individuals were compelled to abandon their property, subjecting it to pillage and destruction, or by which they were forced to sell it at a sacrifice ... have all been considered by international commissions as just grounds for awards." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, pp. 59-60 (citing Gardiner (U. S.) *v.* Mexico, Mar. 3, 1849, opin. 269 (not in Moore), Jobson (U. S.) *v.* Mexico, Mar. 3, 1849, opin. 553 (not in Moore); Gowen and Copeland (U. S.) *v.* Venezuela, Dec. 5, 1885, Moore's Arb. 3354-3359). "Where there have been summary expulsions by which individuals were compelled to abandon their property, subjecting it to pillage and destruction, compensation has been awarded by international tribunals." B.O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, vol. 16, No. 1, 1975, pp. 47-92, pp. 47-92. "Only in cases where an arbitrary expulsion and subsequent deportation would at the same time violate generally recognized human rights is there an international duty to refrain from expulsion, ... because, for instance, ... an expropriation is foreseeable which would constitute an abuse of rights." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 111.

[1137] "For example, the 'right' of expulsion may be exercised ... in order to expropriate the alien's property ... In such cases the exercise of the power cannot remain untainted by the ulterior and illegal purpose." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 209.

[1138] "It is clear that the intention to expropriate without compensation because it denies the essential function of expulsion, may also deny to that act the character of a *bona fide* exercise of discretion. [...] From its function, it follows that the power of expulsion must not be 'abused'. If its aim and purpose are to be fulfilled, the power must be exercised in good faith and not for some ulterior motive, such as...confiscation of property. [...] The principle of good faith and the requirement of justification demand that due consideration be given to the interests of the individual, including ... his property interests ..." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 216 and 307-308 (citation omitted).

the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the General Assembly in 1985, stating that "[n]o alien shall be arbitrarily deprived of his or her lawfully acquired assets". [1139]

481. The national laws of some States contain provisions aimed at protecting the property and economic interests of aliens in relation to expulsion. The relevant legislation may expressly (1) establish that expulsion will not affect any rights acquired by the alien under the State's legislation, including the right to receive wages or other entitlements;[1140] or (2) provide for the transfer of work entitlement contributions to the alien's State.[1141] The national law may provide that any acquisition of property by the State as a result of the alien's expulsion, or in excess of an amount owed to the State, shall be compensated by agreement or, failing such, with a reasonable amount determined by a competent court.[1142] In order to secure a debt that is or may be owed by the alien, a State may attach the alien's property either unilaterally for so long as the law permits,[1143] or by order of a competent court.[1144] A State may authorize its officers to seek out, seize and preserve the alien's valuables pending a determination of the alien's financial liability and the resolution of any debt.[1145] A State may also allow the seizure,[1146] disposition[1147] or destruction[1148] of forfeited items.

6. The principle of non-discrimination

482. The expulsion of aliens should be carried out in conformity with the principle of non-discrimination. The principle of non-discrimination ensures respect for the human rights of all individuals without discrimination on prohibited grounds such as race or religion.[1149] The relevance of the principle of non-discrimination with respect to the expulsion of aliens has been described as follows:

[1139] Resolution 40/144, Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live, 13 December 1985, article 9.

[1140] Argentina, 2004 Act, article 67.

[1141] Italy, 1996 Decree Law, article 5.

[1142] Australia, 1958 Act, articles 3B, 261H(3)(b)(ii), (6).

[1143] Australia, 1958 Act, article 223(1)-(8).

[1144] Australia, 1958 Act, articles 222, 223(9)-(14); and Belarus, 1999 Council Decision, article 26.

[1145] Australia, 1958 Act, articles 223(14)-(20), 224.

[1146] Australia, 1958 Act, articles 261B(1)-(2), 261D.

[1147] Australia, 1958 Act, articles 261F-261I, 261K.

[1148] Australia, 1958 Act, article 261E(1)-(2).

[1149] *See* Part VI.B.2. "Non-discrimination is more generally relevant under treaties which forbid discrimination on specific grounds, such as the Convention on the Elimination of All Forms of Racial Discrimination. This

"The principle of non-discrimination is not stated in general terms by the main human rights treaties. These limit protection from non-discrimination to the rights recognized in the relevant instrument. … As expulsion is not allowed in the case of nationals, the principle of non-discrimination cannot be infringed because aliens are discriminated against nationals. Moreover, the principle only becomes relevant in so far as expulsion interferes with a right that is protected under the treaty, such as the right to family life. Because of the principle of non-discrimination, the State's power to expel is then restricted beyond what would be required by respect for family life alone. Thus, in the so-called *Mauritian women* case the Human Rights Committee found that expulsion was unlawful because legislation discriminated with regard to sex, by protecting foreign wives against expulsion but not foreign husbands of Mauritian nationals."[1150]

483. In the *Mauritian women* case, the Human Rights Committee considered a law that provided immunity from deportation to the foreign wives of Mauritian men but did not provide the same protection to the foreign husbands of Mauritian women. The Human Rights Committee held that: (1) the relationship between the women and their husbands belonged to the notion of "family" for purposes of article 17, paragraph 1 of the International Covenant; (2) the common residence of husband and wife was the normal behaviour of a family; (3) the prohibition of arbitrary interference with family life applies when one of the spouses is an alien; (4) the possibility of deportation interfered with family life; (5) the protection of the family cannot vary depending on the sex of the spouse; and (5) the discrimination based on sex could not be justified by expulsion for security reasons.

"7.2 Up to 1977, spouses (husbands and wives) of Mauritian citizens had the right of free access to Mauritius and enjoyed immunity from deportation. They had the right to be considered *de facto* as residents of Mauritius. The coming into force of the Immigration (Amendment) Act, 1977, and of the Deportation (Amendment) Act, 1977, limited these rights to the wives of Mauritius citizens only. Foreign husbands must apply to the Minister of the Interior for a residence permit and in case of refusal of the permit they have no possibility to seek redress before a court of law. […]

"9.2 (b) 2 (i) 1 First their relationships to their husbands clearly belong to the area of 'family' as used in article 17 (1) of the Covenant. They are therefore protected against what that article calls 'arbitrary or unlawful interference' in this area.

"9.2 (b) 2 (i) 2 The Committee takes the view that the common residence of husband and wife has to be considered as the normal behaviour of a family. … In principle, article 17 (1) applies also when one of the spouses is an alien. Whether the existence and application of

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arguably covers expulsion although it is not mentioned in the lengthy list of rights in Article 5. The list is not designed to be comprehensive." Giorgio Gaja, note 28 above, p. 309 (citation omitted).

[1150] Giorgio Gaja, note 28 above, p. 308 and n. 82 (citing "Views adopted on 9 April 1981", Communication No. R 9/35, partly reproduced in 2 *Human Rights Law Journal* (1981) 139 (para 9.2)).

immigration laws affecting the residence of a family member is compatible with the Covenant depends on whether such interference is either 'arbitrary or unlawful' as stated in article 17 (1), or conflicts in any other way with the State party's obligations under the Covenant.

"9.2 (b) 2 (i) 3 In the present cases, not only the future possibility of deportation, but the existing precarious residence situation of foreign husbands in Mauritius represents, in the opinion of the Committee, an interference by the authorities of the State party with the family life of the Mauritian wives and their husbands. The statutes in question have rendered it uncertain for the families concerned whether and for how long it will be possible for them to continue their family life by residing together in Mauritius. Moreover, … in one of the cases, even the delay for years, and the absence of a positive decision granting a residence permit, must be seen as a considerable inconvenience, among other reasons because the granting of a work permits and hence the possibility of the husband to contribute to supporting the family, depends on the residence permit, and because deportation without judicial review is possible at any time. […]

"9.2 (b) 2 (ii) 3 It follows that also in this line of argument the Covenant must lead to the result that the protection of a family cannot vary with the sex of the one or the other spouse. Though it might be justified for Mauritius to restrict the access of aliens to their territory and to expel them therefrom for security reasons, the Committee is of the view that the legislation which only subjects foreign spouses of Mauritian women to those restrictions, but not foreign spouses of Mauritian men, is discriminatory with respect to Mauritian women and cannot be justified by security requirements. […]

"10.1 Accordingly, the Human Rights Committee acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts … disclose violations of the Covenant, in particular of articles 2 (1), 3 and 26 in relation to articles 17 (1) and 23 (1) with respect to the three co-authors who are married to foreign husbands, because the coming into force of the Immigration (Amendment) Act, 1977, and the Deportation (Amendment) Act, 1977, resulted in discrimination against them on the ground of sex."[1151]

484. The prohibition of discrimination in relation to the expulsion of aliens has been recognized in general terms by the Iran-United States Claims Tribunal in the *Rankin* case. According to the Tribunal, discrimination is one of the factors that render an expulsion unlawful under international law:

"A claimant alleging expulsion has the burden of proving the wrongfulness of the expelling State's action, in other words that it was arbitrary, discriminatory, or in breach of the expelling State's treaty obligations."[1152]

[1151] *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Communication No. R.9/35 (2 May 1978), U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981), paras. 7.2, 9.2(b)2(i)1-3, 92(b)2(ii)3, and 10.1.

[1152] *Rankin v. The Islamic Republic of Iran*, note 136 above, p. 142, para. 22.

485. The Committee on the Elimination of Racial Discrimination has expressed concern about cases of racial discrimination in relation to the expulsion of aliens in several concluding observations.[1153] The Committee has recommended that States parties to the International Convention on the Elimination of All Forms of Racial Discrimination, "as appropriate to their specific circumstances", adopt measures to

> "[e]nsure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin …"[1154]

486. The Committee set up to examine the representation alleging non-observance by Ethiopia of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Termination of Employment Convention, 1982 (No. 158) recognized that the expulsion of aliens could constitute unlawful discrimination in employment and occupation and concluded that the expulsions in question constituted unlawful discrimination concerning termination of employment.

> "On the basis of the information presented by both parties, the Committee concludes that large-scale deportations of persons including workers from Ethiopia to Eritrea and vice versa occurred following the outbreak of the border conflict in May 1998. The Committee notes that expulsion from the country would have the effect of discrimination in employment and occupation, in so far as it was based on a ground prohibited under Convention No. 111 and resulted in loss of employment and related benefits, and was not otherwise permitted under the convention."[1155]

[1153] *See*, for example, Concluding observations of the Committee on the Elimination of Racial Discrimination: France, 1 March 1994, A/49/18, para. 144 ("Concern is expressed that the implementation of these laws [*i.e.* laws of immigration and asylum] could have racially discriminatory consequences, particularly in connection with the imposition of limitations on the right of appeal against expulsion orders and the preventive detention of foreigners at points of entry for excessively long periods."); Concluding observations of the Committee on the Elimination of Racial Discrimination: France, 23 March 2000, CERD/C/304/Add.91 (19 April 2000), para. 9 ("The Committee expresses concerns about possible discrimination in effect in the implementation of laws providing for the removal of foreigners from French territory, including persons in possession of valid visas, and the delegation of responsibilities which should be exercised by States officials."), as well as Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada, 21 August 2002, A/57/18, para. 336 ("The Committee notes with concern that current immigration policies, in particular the present level of the 'right of landing fee', may have discriminatory effects on persons coming from poorer countries. The Committee is also concerned about information that most foreigners who are removed from Canada are Africans of African Descent.")

[1154] Committee on the Elimination of Racial Discrimination, general recommendation XXX: Discrimination against Non-Citizens, 64th session, 23 February-12 March 2004, CERD/C/64/Misc.11/rev.3, para. 25.

[1155] International Labour Organization, Report of the Committee set up to examine the representation alleging non-observance by Ethiopia of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Termination of Employment Convention, 1982 (No. 158), made under article 24 of the ILO Constitution by the National Confederation of Eritrean Workers (NCEW), 1998, para. 33.

> "[A]t least some of the deportations constitute discriminatory acts on the basis of political opinion within the meaning of Article 1(1)(a) of the Convention.[1156,1157]

> "The Committee notes that if the expulsions were themselves based on grounds of discrimination prohibited under Conventions Nos. 111 and 158, then the terminations have a direct causal relationship with the expulsions, and cannot be characterized as 'mere consequences' that bear no relationship to Convention No. 158. The deportations that took place resulted in the constructive termination of the employment of the persons concerned. Thus, for the reasons set forth in the Committee's conclusions under Convention No. 111, to the extent that the expulsions were based on national extraction and/or political opinion, they constituted a violation of the provisions governing termination of employment set forth in Convention No. 158."[1158]

487. In contrast, discrimination against nationals of different countries may be justified on the basis of treaties which provide a higher standard of treatment for nationals of States parties. Attention may be drawn in this respect to the case-law of the European Court of Human Rights. Discussing the principle of non-discrimination in relation to the impact of an expulsion on family life, the Court considered that preferential treatment with respect to expulsion in favor of nationals of States of the European Union was not contrary to the European Convention of Human Rights. In fact, such preferential treatment

> "... is based on an objective and reasonable justification, given that the member States of the European Union form a special legal order, which has, in addition, established its own citizenship."[1159]

[1156] Article 1 of Convention No. 111 states: "1. For the purpose of this Convention the term *discrimination* includes: (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies. 2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination. 3. For the purpose of this Convention the terms *employment* and *occupation* include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment."

[1157] International Labour Organization, note 1155 above, para. 36.

[1158] Ibid., para. 39.

[1159] European Court of Human Rights, *Case of C. v. Belgium*, Judgment (Merits), 7 August 1996, Application number 21794/93, paras. 37-38. "Differences of treatment of categories of aliens may be justified under circumstances. For instance, nationals of certain States may enjoy a higher standard of protection against expulsion because of the links that are established between their States of nationality and the State of immigration. The European Court stated in *Moustaquim* and later in *C. v. Belgium* that preferential treatment of EC citizens within EC Member States other than that of nationality was based on an "objective and reasonable justification". Giorgio Gaja, note 28 above, pp. 308-309 (citations omitted).

7. Restrictions and derogations

488. A State may be permitted to restrict or derogate from some human rights in the expulsion of aliens in certain circumstances. Many of the guarantees contained in human rights treaties, such as the protection of family life,[1160] freedom of conscience and religion[1161] and freedom of expression[1162] are

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[1160] *See* article 17, para. 1, of the International Covenant on Civil and Political Rights, which protects only against *arbitrary* interference in family life ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."; article 8, para. 2, of the European Convention on Human Rights ("There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."); article 11, para. 2, of the American Convention on Human Rights ("2. No one may be the object of *arbitrary* or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation." [Emphasis added.]).

[1161] See article 18, para. 3 of the International Covenant on Civil and Political Rights ("Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."); article 9, para. 2, of the European Convention on Human Rights ("Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."); article 12, para. 3, of the American Convention on Human Rights ("Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others."); and article 8 of the African Charter of Human and Peoples' Rights ("Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.").

[1162] *See* article 19, para. 3, of the International Covenant on Civil and Political Rights ("The exercise of the rights provided for in paragraph 2 [freedom of expression] of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals."); article 10, para. 2, of the European Convention on Human Rights ("The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."); article 13, paras. 2-5 of the American Convention on Human Rights ("2. The exercise of the right provided for in the foregoing paragraph [freedom of thought and expression] shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals. 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and not absolute but may be restricted for specified reasons such as public order, national security[1163] or the protection of the rights of others. As regards national security, the view has been expressed that there should be some objective evidence of the need for this exception.[1164] However, States may be hesitant to provide confidential information relating to sensitive issues of national security. The Rome Statute of the International Criminal Court addresses this issue in the context of criminal proceedings.[1165] Moreover, most of the guarantees contained in human rights treaties may be

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adolescence. 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."); and article 9 of the African Charter of Human and Peoples' Rights ("Every individual shall have the right to express and disseminate his opinions *within the law*." [Emphasis added.]).

[1163] "National security grounds sometimes arise in international law as exceptions to rights secured under human rights and other conventions. These exceptions take the form of limitations on rights ('clawbacks') or as grounds for derogating from rights protected in the convention. […] The appropriateness of a limitation or derogation is judged on a case-by-case basis; but it is certain that a significant threat to national security would rank high among the state interests that could trigger restriction of a right." Alexander T. Aleinikoff, "International Legal Norms and Migration: A Report" *in* Alexander T. Aleinikoff, note 119 above, pp. 5-6.

[1164] "[S]cholars, however, have urged that an objective showing of the security need should be required." David Fisher et al., note 130 above, pp. 117-118 (citing I. Cameron, *National Security and the European Convention on Human Rights* (2000) pp. 430-432).

[1165] Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3 (Protection of national security information):

"1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests.

[…]

"5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

"(a) Modification or clarification of the request;

"(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

"(c) Obtaining the information or evidence from a different source or in a different form; or

"(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

"6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests."

derogated from under exceptional circumstances, with the exception of some guarantees – including the right to life and the prohibition of torture or inhumane or degrading treatment – which are considered to be so essential that they are not subject to any derogation.[1166]

C. Destination

489. The function or purpose of the expulsion of aliens is to remove an alien whose presence is contrary to the interests of the State from its territory. This is achieved once the alien has moved outside of or has been removed from the territory of the expelling State. Thus, it has sometimes been argued that the destination of the alien is of no concern to the expelling State. This may be particularly

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[1166] *See*, in particular, article 4 of the International Covenant on Civil and Political Rights ("1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6 [right to life], 7 [prohibition of torture or cruel, inhuman or degrading treatment or punishment], 8 (paragraphs 1 and 2) [prohibition of slavery and servitude], 11 ['No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.'], 15 [non-retroactivity of penal law], 16 [recognition as a person before the law] and 18 [freedom of thought, conscience and religion] may be made under this provision. 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."); article 15 of the European Convention on Human Rights ("Derogation in time of emergency – 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Article 2 [right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [prohibition of torture], 4 (paragraph 1) [prohibition of slavery or servitude] and 7 ['no punishment without law'] shall be made under this provision. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."); and article 27 of the American Convention on Human Rights ("1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from *Ex Post Facto* Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. 3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.").

true in cases in which the alien agrees to or is given the opportunity to leave the territory voluntarily. In such a case, the alien may well be allowed to travel to any State that will admit him or her, including the State of nationality.[1167]

490. The discretion of a State to determine the destination of an alien who is subject to expulsion may be limited by various considerations as discussed below.

> "The competence of the States on the one hand to admit or expel aliens, and, on the other hand, to accept expellees from other States, often creates a conflict, particularly when the State of destination is not prepared to admit expellees, or when the persons to be expelled are stateless; an especially difficult problem also exists in regard to those categories whose return to the State of their origin would violate the principles of humanity because of the danger of persecution. An answer to the question as to what extent the discretionary power of the State may be restricted by international law has been given both by theory and practice as expressed in international instruments and usage, as well as in jurisprudence developed by arbitration courts."[1168]

491. The determination of the destination of an alien who is required to leave the territory of a State as a result of expulsion may require consideration of the following: (1) the rights of an alien in determining the State of destination; (2) the admissibility of an alien to a particular State;[1169] and (3) the consequences of the alien being sent to a particular State.

1. The rights of aliens

492. Human rights law may influence the determination of the State of destination of aliens who are subject to expulsion from a State. An alien who is subject to expulsion may have rights with respect to the choice of destination or the right to return to his or her State of nationality which may influence the determination of the State of destination.

(a) Choice of destination

493. The right of an alien with respect to the choice of destination as a result of expulsion is unclear as a matter of international law.[1170] This right would not appear to be expressly recognized in the

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[1167] *See* Part IX.A.

[1168] United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955, pp. 1-77. (ST/SOA.22 and Corr.2 (replaces Corr.1)), para. 102.

[1169] See Karl Doehring, "Aliens, Admission", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 107-109.

[1170] "A duty of the expelling State to give the individual the possibility of choosing a receiving country is not recognized although this opportunity may be, and often is, granted." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 111.

relevant international instruments. Nonetheless, the Human Rights Committee has expressed support for the right of an alien who is subject to expulsion to determine his or her destination in its General Comment No. 15 which states as follows:

> "Normally an alien who is expelled must be allowed to leave for any country that agrees to take him." [1171]

494. The view has been expressed that the right of a State to expel an alien does not necessarily include the right to determine the destination of the alien.

> "In addition, in its General Comment on the position of aliens under the Covenant, the Committee has stressed that an alien who is expelled must normally be allowed to leave for any country willing to accept him. This is supposed to make clear that the State's sovereignty to expel aliens does not necessarily include the right to decide *where the person concerned is to be deported*. This decision is primarily the province of the deportee himself, as well as other States that grant him entry. If no other State is prepared to take him, the alien may be deported directly to his home country, occasionally to his country of origin." [1172]

495. In contrast, the view has been expressed that the State is not under any obligation to accept the choice of destination of an alien who is subject to expulsion.

> "The State of nationality is not necessarily the State to which an alien is expelled. Should more than one country be willing to admit the alien, the question arises of whether the individual is entitled to choose the State of destination. This seems the view expressed by the Human Rights Committee in its General Comment No. 15/27: 'Normally an alien who is expelled must be allowed to leave for any country that agrees to take him'. In favour of this opinion one could say that the expelling State's interest is satisfied once the alien is removed from its territory. However, considerations of expediency and costs may prompt the expelling State to disregard the individual's wishes. This could affect the individual's human rights only under particular circumstances: for instance, … when a refugee risks being persecuted in his or her country of origin. It would be difficult to hold that in principle the expelling State is under an obligation to accept the choice made by the individual. No such obligation has been stated in the instruments concerning expulsion nor can one find support of the existence of an obligation in State practice. As a consequence, any restriction that may apply to the selection of the State of destination only derives from rules of municipal law." [1173]

[1171] Human Rights Committee (International Covenant on Civil and Political Rights), General Comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, para. 9.

[1172] Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Kehl am Rhein, N.P. Engel Publisher, 1993, p. 228 (referring to General Comment No. 15, para. 9) (citation omitted).

[1173] Giorgio Gaja, note 28 above, p. 293 (citation omitted), quoting Human Rights Committee, General Comment No. 15/27, *Yearbook of the Human Rights Committee* (1985-1986) 11-515. "Two judicial decisions

496. The State may permit the alien to choose a State of destination which is willing to admit him or her under national law.[1174] However, the national laws of various States are not uniform in this respect. National legislation may allow the alien to choose the State of destination,[1175] but may require that the latter be willing to grant the alien entry,[1176] or that the selection be limited to those States where the alien's entry would be legal.[1177] A State may grant this choice as the primary option,[1178] an alternative primary option,[1179] or an alternative secondary option[1180] for selecting the State of destination. A State may place conditions on the choice of a contiguous or adjacent State,[1181] or select a State of destination if the alien's choice is not made promptly[1182] or would prejudice the expelling State's interests.[1183]

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give an indication that restrictions, if any, only apply to a certain extent. In the well-known case of the *Duke of Chateau Thierry* in the UK Court of Appeal L.J. Swinfen Eady concluded that: '[...] although the Executive Government has no power to order a deported alien to go to any particular place, yet by the authority given it to detain the alien and place him on board a ship (which I construe as meaning a ship which the Government select) and detain him there until the ship finally leaves the United Kingdom, the result may be that the alien will have to disembark in the country to which that ship shall directly sail.' In *Muller v. Superintendent, Presidency Jail, Calcutta* the Supreme Court of India held: 'In the case of expulsion [...] if a person is prepared to leave voluntarily he can ordinarily go as and when he pleases. But he has no *right* in that regard.'" *Id.* at pp. 293-294 (emphasis in original), quoting *Duke of Chateau Thierry*, Judgement of 16 March 1917, [1917] 1 *King's Bench Division* 922 at 931; and *Muller v. Superintendent, Presidency Jail, Calcutta and Others*, India, Supreme Court, 23 February 1955, *International Law Reports*, 1955, H. Lauterpacht (ed.), pp. 497-500, at p. 499.

[1174] "Further, he should ... be allowed to choose the country to which he may apply for admission." Shigeru Oda, "Legal Status of Aliens", *in* Max Sørensen (dir.), *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, at p. 483. "In the United Kingdom the Secretary of State may order an alien to leave the country within a stated period. ... It may enable the alien to select the country to which he will retire." D. P. O'Connell, *International Law*, vol. 2, 2nd ed., London, Stevens & Sons, 1970, p. 710 (citations omitted). "[In] German law ... the first choice is given to the alien." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 254-255.

[1175] Belarus, 1998 Law, article 32; Guatemala, 1986 Decree Law, article 88; Japan, 1951 Order, article 53(2)(6); Republic of Korea, 1992 Act, article 64(2)(4); Switzerland, 1931 Federal Law, article 14(2); and United States, INA, sections 238(c)(3)(B), 241(b)(2)(A), 250, 507(b)(2)(A). A State may specifically entitle the alien to choose the State of destination when the alien departs voluntarily after expulsion procedures have commenced (Belarus, 1998 Law, article 32).

[1176] Guatemala, 1986 Decree Law, article 88; and United States, INA, sections 241(b)(2)(C)(ii)-(iv), 250.

[1177] Switzerland, 1931 Federal Law, article 14(2).

[1178] Switzerland, 1931 Federal Law, article 14(2); and United States, INA, sections 241(b)(2)(A), 507(b)(2)(A).

[1179] Guatemala, 1986 Decree Law, article 88; and United States, INA, section 250.

[1180] Japan, 1951 Order, article 53(2)(6); and Republic of Korea, 1992 Act, article 64(2)(4).

[1181] United States, INA, section 241(b)(2)(B).

[1182] United States, INA, section 241(b)(2)(C)(i).

[1183] United States, INA, sections 241(b)(2)(C)(iv), 507(b)(2)(A), (B).

497. There is also a lack of uniformity in the jurisprudence of the national courts of different States in terms of the discretion of the expelling State to determine the State of destination of an alien who is subject to expulsion;[1184] the right of an alien who is subject to expulsion to choose the State of destination;[1185] and the limitations on the right of the alien to make such a choice.[1186]

(b) Right to enter or return to the State of nationality

498. The right of individuals to enter or return[1187] to their State of nationality (or their "own country") has been recognized in international and regional human rights instruments, including the

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[1184] *Muller v. Superintendent, Presidency Jail, Calcutta and Others,* India, Supreme Court, 23 February 1955, *International Law Reports,* 1955, H. Lauterpacht (ed.), pp. 497-500, at p. 499 ("In the case of expulsion, no idea of punishment is involved, at any rate in theory, and if a person is prepared to leave voluntarily he can ordinarily go as and when he pleases. But he has no *right* in that regard. Under Indian law, the matter is left to the unfettered discretion of the Union Government and that Government can prescribe the route and the port or place of departure and can place him on a particular ship or plane ...") (emphasis in original); *Mohamed and Another,* note 221 above, p. 483 ("Once it has been decided to remove such person and such decision persists, whether the decision to remove is obligatory or permissive, the State has no discretion but to remove the person to the destination as prescribed in paras *(a)* and *(b).*"); *Moore v. The Minister of Manpower and Immigration,* Canada, Supreme Court, 24 June 1968, *International Law Reports,* volume 43, E. Lauterpacht (ed.), pp. 213-218, at p. 216 (Judson J., with whom Martland and Ritchie JJ. Concurred, concluded that under the relevant legislation "the choice rests with the Minister and not with the person to be deported. He has the power and its mode of exercise does not raise a question of law which is reviewable by this Court."); *In re Guerreiro et al.,* Argentina, Supreme Court, 27 November 1951 [*International Law Reports,* 1951, H. Lauterpacht (ed.), Case No. 97, p. 315 (citation omitted) ("We cannot admit the contention that the protection of the individual afforded by the writ of habeas corpus extends to the grant of a right of option by an alien as to the country to which he is to be expelled. Such an interpretation would constitute a unilateral restraint upon the power of the Executive Branch to adopt such measures as may be deemed necessary to assure public peace and tranquility and would thereby establish a condition foreign to the intention of the law."); *Papadimitriou v. Inspector-General of Police and Prisons and Another,* Palestine Supreme Court sitting as a High Court of Justice, 3 August 1944, Annual Digest and Reports of Public International Law Cases, 1943-1945, H. Lauterpacht (ed.), Case No. 68, pp. 231-235, at p. 234 (Edwards, J.) ("[T]he effect of leaving the choice of ship to the Secretary of State is to deprive the alien, of choice of ship, and, of course, choice of destination.").

[1185] See, e.g., *Jama v. Immigration and Customs Enforcement,* United States Supreme Court, 12 January 2005, No. 03-674 ("The statute thus provides four consecutive removal commands. (1) An alien shall be removed to the country of his choice (subparagraphs (A) to (C)), unless one of the conditions eliminating that command is satisfied"); *Ngai Chi Lam v. Esperdy,* United States Court of Appeals, Second Circuit, 411 F.2d 310, 4 June 1969, *International Law Reports,* volume 53, E. Lauterpacht (ed.), pp. 536-538. Some States allow expulsion to the alien's preferred destination, assuming the State of destination is willing to admit the alien, but do not require it. See, e.g., *Chan v. McFarlane,* Canada, Ontario High Court, 5 January 1962, *International Law Reports,* volume 42, E. Lauterpacht (ed.), pp. 213-218.

[1186] See, e.g., *Ngai Chi Lam v. Esperdy,* United States Court of Appeals, Second Circuit, 411 F.2d 310, 4 June 1969, *International Law Reports,* volume 53, E. Lauterpacht (ed.), pp. 536-538 (Special Inquiry Officer was justified in declining to accept alien's designated destination, since the designation was not made in good faith but solely for the purpose of delay in effecting deportation.)

[1187] "All nationals of a State have the right to enter the territory of that State, and that State may not impose arbitrary restrictions on the exercise of that right." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 39, Governing Rule 6 (italics omitted).

Universal Declaration of Human Rights;[1188] the International Covenant on Civil and Political Rights;[1189] Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms;[1190] the American Convention on Human Rights;[1191] and the African Charter on Human and Peoples' Rights.[1192] The right of return may not be absolute.[1193] In this regard, the International Covenant prohibits the arbitrary deprivation of this right. More specifically, the African Charter recognizes that this right may be restricted by law for reasons of national security, law and order, public health or morality. The view has been expressed that the right to return may constitute a generally recognized principle of international law.[1194]

499. The Human Rights Committee has explicitly recognized the application of this principle in relation to the expulsion of aliens. In its General Comment No. 15, the Human Rights Committee stated as follows:

> "[A] State party cannot, by restraining an alien or deporting him to a third country, arbitrarily prevent his return to his own country (art. 12, para. 4)."[1195]

[1188] Article 13, paragraph 2: "Everyone has the right to leave any country, including his own, and to return to his country."

[1189] Article 12, paragraph 4: "No one shall be arbitrarily deprived of the right to enter his own country."

[1190] Article 3, paragraph 2: "No one shall be deprived of the right to enter the territory of the State of which he is a national."

[1191] Article 22, paragraph 5: "No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it."

[1192] Article 12, paragraph 2: "Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality."

[1193] "The right to return, like other rights, is not absolute but is subject to regulation; the International Covenant on Civil and Political Rights states, in effect, that there shall be no arbitrary deprivation, thus giving rise to the conclusion that there can be a deprivation in certain circumstances. In particular, the individual concerned should have the right to make an appeal to a higher authority concerning the issue whether a deprivation was 'arbitrary.'" Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 7.

[1194] "The right to return, also provided for in Article 13(2) of the Universal Declaration of Human Rights and in Article 12(4) of the International Covenant on Civil and Political Rights, may be considered as [a] generally accepted principle of international law. The right to return, without any doubt, applies to citizens… As long as a person is a citizen he or she cannot be barred from returning to his or her country …" Ibid.

[1195] Human Rights Committee (International Covenant on Civil and Political Rights), General Comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, para. 8. "When the person concerned desires to return to his home country, neither this State nor the expelling country may, pursuant to Art. 12(4), prevent him from doing so." Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Kehl am Rhein, N.P. Engel Publisher, 1993, p. 228.

500. Attention may also be drawn to the following provisions of Annex 9 to the Convention on International Civil Aviation:

> "5.22. A Contracting State shall admit into its territory its nationals who have been deported from another State."
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> "5.26. A Contracting State shall, when requested to provide travel documents to facilitate the return of one of its nationals, respond within a reasonable period of time and not more than 30 days after such a request was made either by issuing a travel document or by satisfying the requesting State that the person concerned is not one of its nationals."[1196]
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> "5.28. When a Contracting State has determined that a person for whom a travel document has been requested is one of its nationals but cannot issue a passport within 30 days of the request, the State shall issue an emergency travel document that attests to the nationality of the person concerned and that is valid for readmission to that State."

501. Whereas the European Convention and the American Convention recognize the right to return to the *State of nationality*, the Universal Declaration, the International Covenant and the African Charter recognize "the right … to return to *his country*", "the right to enter his *own country*" and the "the right to return to *his country*", respectively. [Emphasis added.]

502. The notion of one's own country in the context of the relevant provision of the International Covenant has been broadly interpreted by the Human Right Committee. In its General Comment No. 27, the Committee has indicated that the phrase "his own country" is broader than the "country of nationality" since it includes situations in which an individual, although not a national of a country, has "close and enduring connections" with the latter. Moreover, the Committee is of the view that there are very few circumstances in which an individual could be deprived of this right in a reasonable manner. In its General Comment No. 27, the Committee has stated as follows:

> "19. The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. … It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality).
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> […]
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> "20. The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ('no one'). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase 'his own country'. The scope of 'his own country' is

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[1196] Convention on International Civil Aviation, Chicago, 7 December 1944, Annex 9 (12th ed.), United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.

broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.

"21. In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not … by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country."[1197]

503. The right to enter or return to the State of nationality or one's own country may be of special significance to aliens who are subject to expulsion from the territory of a State. Even if the expelled aliens do not have a general right of choice with respect to destination under international or national law, aliens who are subject to expulsion (in contrast to extradition) may have the right to return to their State of nationality or their own State rather than being sent to a third State. This right may be recognized in the national laws and constitutions of States.[1198]

[1197] Human Rights Committee (International Covenant on Civil and Political Rights), General Comment No. 27: Freedom of Movement (Article 12), 2 November 1999, paras. 19-21 (citation omitted).

[1198] "The municipal laws of most countries guarantee the right of nationals to enter the territory of the State. There are examples in numerous domestic constitutions, such as Article 81 of the 1979 Constitution of Kenya: 'No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.' Article 9(1) of the 1957 Constitution of Malaysia: 'No citizen shall be banished or excluded from the Federation.' Article 15 of the Constitution of Pakistan: 'Every citizen shall have the right to remain in, and, subject to any reasonable restriction imposed by the law in the public interest, enter and move freely throughout Pakistan and to reside and settle in any part thereof.' Article 15(2) of the 1977 Swiss Federal Constitution: '[All Swiss citizens] can leave and return to Switzerland at any time.' … and Article 18 of the 1961 Constitution of the Turkish Republic: 'Turkish citizens shall be free to leave and to re-enter Turkey. The freedom to leave Turkey shall be regulated by law.' … In various judicial pronouncements in Canada, for

(c) Principle of non-discrimination

504. The principle of non-discrimination is applicable to the right to return to one's country under international law.[1199] In this regard, article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination states as follows:

> "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] (d) (ii) The right … to return to one's country."

(d) Relationship between human rights considerations and the duty of admission by a State

505. The relationship between human rights considerations and the admissibility of an alien to a particular State may require consideration. The fact that an alien indicates a preference for being expelled to a particular State does not necessarily mean that the chosen State has a duty or is willing to admit the alien. In general, only the State of nationality has a duty to admit its national who has been expelled from another State. Other States may have a duty to admit an alien pursuant to a treaty obligation or may agree to admit an alien in a particular case. Moreover, the mere fact that an alien does not wish to return to his or her State of nationality does not preclude this possibility if no other State is willing to admit the alien. This issue has been discussed as follows:

> "But whatever discretion states may have under these human rights norms *vis-à-vis* the individual involved, they still owe a separate obligation to other states to accept return, which appears to be of wider application. This norm, requiring that a state accept return of its nationals when demanded by another state on whose territory they are found, is of more ancient lineage than the comparable human rights norm, and may be applicable even if the individual resists return (on grounds that do not give rise to a valid individual claim, such as a well-founded fear of persecution in the country of nationality, that would trump the host state's authority to expel)."[1200]

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example *R.* v. *Soon Gin* [3 D.L.R. 125 (1941)], and in the United States, for example *Worthy* v. *United States* [328 F. 2d 386 (1964)], it has been held or implied that their nationals enjoy the constitutional right to enter their country." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 40-41.

[1199] "A refusal of admission may also be inconsistent with international customary law or general principles of law such as the rule of non-discrimination or the prohibition of the abuse of rights, which take precedence over municipal action." Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 104.

[1200] David A. Martin, "The Authority and Responsibility of States" *in* T. Alexander Aleinikoff, and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 31-45, at p. 41 (citation omitted).

2. The State of destination

506. There may be various possibilities with respect to the State of destination for aliens who are subject to expulsion, including the State of nationality; the State of residence; the State which issued the travel documents to the alien; the State of debarkation; State party to a treaty; consenting State as well as other States. The national laws of States often provide for the expulsion of aliens to various States depending on the circumstances of a particular case.[1201] The determination of the State of destination may involve consideration of the admissibility of an alien to a particular State.

(a) State of nationality

507. The State of nationality appears to be the most common destination for nationals who have been expelled from the territory of other States. The State of nationality has a duty to admit its nationals under international law. As early as 1892, the Institut de Droit International recognized that a State may not prohibit its nationals from entering its territory.[1202] This duty has been recognized in the Convention on the Status of Aliens.[1203]

508. The duty of a State to admit its nationals has also been considered in literature.[1204] Some authors have described the duty of a State to admit its nationals as a necessary corollary of the right of

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[1201] "National law commonly makes provision for the deportation or expulsion of aliens to a wide variety of jurisdictions." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 468.

[1202] "In principle, a State must not prohibit access into or a stay in its territory either to its subjects or to those who, after having lost their nationality in said State, have acquired no other nationality." *Règles internationales*, note 56 above, article 2.

[1203] Convention on the Status of Aliens, Havana, 20 February 1928, *in* Charles I. Bevans (dir.), *Treaties and other international agreements of the United States of America 1776-1949, vol. 2: Multilateral*, 1918-1930, pp. 710-713, article 6, paragraph 2: "States are required to receive their nationals expelled from foreign soil who seek to enter their territory."

[1204] "The expulsion and deportation into a particular State is of course only possible if that State is willing to receive the individual. Only the country whose nationality the individual possesses is obliged to receive him." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 111. "It is generally accepted that the State of nationality is obliged to receive the alien ..." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 255 (citation omitted). "Whereas a state may exclude aliens in its discretion, it is obliged to admit their own nationals who have been expelled from another state, at least where they have nowhere else to go." David John Harris, *Cases and Materials on International Law*, 4th ed., London, Sweet & Maxwell, 1991, p. 505. "While international practice demonstrates that a state may not lawfully expel an alien to a country which is unwilling to admit him, the same practice demonstrates that if none will admit him he may be sent to his state of nationality." Richard Plender, "The Ugandan Crisis and the Right of Expulsion under International Law", *The Review: International Commission of Jurists,* No. 9, 1972, pp. 19-32, at p. 26 (citing *Rv. Governor, Brixton Prison, ex parte Soblen,* [1962] 3 All E.R. 641, 661; *Ying et al v. Kennedy,* 292 F.2d. 740 (1961); *Moore v. The Minister of Manpower and* a State to expel aliens in order to ensure the effectiveness of this right.[1205] The question has been raised as to whether a State has a duty to admit a national who has been subject to unlawful expulsion.[1206] In other words, does a State have a duty to admit its nationals in cases in which the expelling State does not have a right to expel the individuals? This question may require consideration of the relationship between the right of the territorial State to expel aliens from its territory and the duty of the State of nationality to receive its nationals who have been expelled from other States. This question may also require consideration of the possible legal consequences of an unlawful expulsion in terms of remedies. The traditional view would appear to be that a State has a duty to admit its nationals as a consequence of their nationality independently of the lawfulness or unlawfulness of the expulsion or any other circumstances which may have influenced the return of its national.[1207]

Immigration, Canada, Supreme Court, 24 June 1968, *International Law Reports*, volume 43, E. Lauterpacht (ed.), pp. 213-218). "Most frequently the choice turns next [after the State of embarkation] to the State of which the deportee is a national. The choice is an obvious one, not only because the idea of 'sending somebody home' is natural, but above all because the national State of a person is the only State which by international law is obliged to accept him." Ivan Anthony Shearer, *Extradition in International Law,* Manchester, University Press, 1971, p. 78 (citation omitted). See also S.K. Agrawala, *International Law Indian Courts and Legislature,* Bombay, N.M. Tripathi Private Ltd., 1965, p. 103.

[1205] "Reference has already been made in different contexts to the obligation of the State to admit its own nationals. This obligation is most traditionally stated as correlative to the 'right' of expulsion. Schwarzenberger observes: 'To make the right of expulsion effective, the practice of States has insisted on the duty of the home State to receive back any national expelled from a foreign State.' Oppenheim is also specific, and describes the function of nationality as involving one particular right and one particular duty: 'The right is that of protection over its citizens abroad which every State holds... The duty is that of receiving such of its citizens as are not allowed to remain on the territory of other States.'" Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 136 (citations omitted) (quoting Schwarzenberger, *International Law* (3rd ed., 1957), vol. I, p. 361; and Oppenheim, *International Law* (8th ed., 1955), vol. I, pp. 645-646). "The right to expel aliens has its counterpart in the duty of a state to receive back into its territory those of its nationals who have nowhere else to go." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 944 (citation omitted). "That a State has in general the right to expel aliens from its territory is not in doubt. The right has long been acknowledged; and has its corollary (if not its precise counterpart) in the duty of each State to readmit to its territory those of its nationals who have been lawfully expelled from other States." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 459 (citations omitted).

[1206] "Moreover, it is far from clear that a State is under a duty to receive those of its nationals who have been unlawfully expelled from another State, at least in so far as the duty to admit is one which is owed between States alone." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 201-202 (citation omitted).

[1207] "The proposition that every State must admit its own nationals into its territory is widely accepted and may now be regarded as an established principle of international law. Nationality is a juridical and political link which unites an individual with a State, and it is that link which enables a State to afford protection against all other States; the same link is not created between a person and a State in which the person is ordinarily resident if the person is not a national of that State. ... The duty to admit a person into the territory of a State is considered to be an attribute of nationality." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 39-40 (citing International Court of Justice, *Nottebohm Case* (Liechtenstein v. Guatemala), 1955 I.C.J. Rep. 4; and European Court of Justice, *Van Duyn* v. *Home Office*, 1 Common Market Law Reports 1,18 (1975)).

509. Attention has been drawn to the possibility of the State of nationality imposing requirements for the admission of nationals, such as proof of nationality in the form of a passport or other documentation. Practical problems may arise in situations in which the national cannot provide such information. It has been suggested that a person claiming a right of return should be given a reasonable opportunity to establish nationality and the possibility of a review of a denial of nationality.

> "A State's law may require that a national seeking entry into its territory shall be in possession of a passport. This may be needed to establish identity and national status.
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> "Some countries have required nationals to be in possession of a passport for entry into the country only in time of war. Even in those cases where a passport is not required, a national without a passport is likely to encounter delays and difficulties in entering the country unless other documents could establish identity and national status. A driver's license or a ration card may suffice to prove a person's identity but may not identify nationality; on the other hand, a voter's registration card may sometimes suffice to obtain admission.
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> "It is almost the universal practice not to require entry visas in respect of nationals, but a State may, in the interest of public health, require nationals to be in possession of a health certificate or a certificate of inoculations in conformity with its laws.
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> "Problems may at times be encountered when a person, without a national passport, is required to establish national status in order to claim the right of entry or return to the country of nationality. This happens, for instance, when a person is resident for a long time in a foreign country and had not cared to take out a passport or had lost the passport in a revolution or upheaval and was forced to return to the country of nationality. It may even be that the authorities in the foreign country had taken the step to expel the person and confiscated the passport at the same time. In such cases the person must fall back on other means to establish national status. For persons born in the country of their nationality who can claim this nationality by virtue of birth, some record is likely to be available in the shape of a birth certificate or in the local register for births. For persons naturalized in the country, the certificate of naturalization and other records would be easily traceable, but in cases where the person was born abroad and claims nationality by virtue of descent, the situation would undoubtedly be more complex.
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> "Whatever may be the case, a person claiming the right of return must be given an opportunity to establish national status and the matter must be determined objectively through application of due process. In the event of a refusal of a claim to national status and, consequently, the right to enter, a review of such decision by appropriate judicial or administrative authorities should be available."[1208]

[1208] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 46-47. "Departure

510. The question has been raised as to whether the duty to admit a national applies in the case of dual (or multiple) nationality as between the respective States of nationality.[1209] As mentioned previously, this question may be governed by the rules of international law relating to nationality and therefore be beyond the scope of the present topic.[1210]

511. The national laws of some States provide for the expulsion of an alien to the State of nationality or another State with special ties to the individual. Thus, the expelling State may return an alien to the State (1) of which the alien is a citizen or national,[1211] or a native;[1212] (2) to which the alien "belongs";[1213] (3) which is the alien's State of "origin" (when this State is clearly distinguished from the State of embarkation);[1214] or (4) which was the alien's birthplace.[1215] The expelling State

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from a state's territory will in most cases be dependent upon the possession of a passport. Note that in 1976, the British Government withdrew the passports of United Kingdom citizens who had fought as mercenaries in the Angolan war of independence. 'The Foreign Office said that these will not be returned, and that future applications will be refused unless the men sign a declaration they will not work as mercenaries.'" David John Harris, *Cases and Materials on International Law*, 4th ed., London, Sweet & Maxwell, 1991, p. 506 (citations omitted).

[1209] "Issues have arisen with respect to diplomatic protection of dual nationals, and two rules have emerged. Article 4 of the 1930 Convention [on Conflict of Nationality Laws] makes clear that '[a] State may not afford protection to one of its nationals against a State whose nationality such person possesses.' On the other hand, if the matter arises in a third state, or before an international tribunal, according to Article 5 of the Convention and later jurisprudence, 'a third State (or a tribunal) shall of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.' It is not clear whether this rule devised for diplomatic protection should also apply in international human rights law, and whether a state is obliged to recognize the right of return or free entry into its territory by persons who are dual nationals when their active or overriding nationality is that of another State." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 46-47.

[1210] *See* Part III.A.1.

[1211] Belarus, 1998 Law, articles 19, 33; Brazil, 1980 Law, article 57; France, Code, articles 513-2(1), 532-1; Japan, 1951 Order, article 53(1); Nigeria, 1963 Act, articles 17(1)(c)(i), 22(1); Republic of Korea, 1992 Act, article 64(1); and United States, INA, sections 241(b)(1)(C)(i), (2)(D), 250.

[1212] United States, INA, section 250.

[1213] Italy, 1998 Decree-Law No. 286, article 13(12), 1998 Law No. 40, article 11(12), 1996 Decree Law, article 7(3); and Kenya, 1967 Act, article 8(2)(a).

[1214] Bosnia and Herzegovina, 2003 Law, article 64(1); Guatemala, 1986 Decree Law, article 88; Honduras, 2003 Act, article 3(23); Paraguay, 1996 Law, article 78; Sweden, 1989 Act No. 529, section 8.5; and Switzerland, 1999 Ordinance, article 9.

[1215] Japan, 1951 Order, article 53(2)(4)-(5); Republic of Korea, 1992 Act, article 64(2)(1); and United States, INA, section 241(b)(1)(C)(ii), (2)(E)(iv)-(vi). A State may establish this destination as a tertiary option that it may choose (United States, INA, section 241(b)(2)(E)(iv)-(vi)).

may establish this destination as the primary option,[1216] an alternative primary option,[1217] a secondary option that it may choose,[1218] or an alternative secondary option.[1219]

512. The national courts of States have, in general, upheld the right of a State to expel an alien to his or her State of nationality.[1220] Moreover, some national courts have indicated that there is a presumption that the State of nationality would accept an expelled national.[1221]

[1216] Belarus, 1998 Law, article 19; France, Code, articles 513-2(1), 532-1; Italy, 1996 Decree Law, article 7(3); Japan, 1951 Order, article 53(1); Nigeria, 1963 Act, article 17(1)(c); and Republic of Korea, 1992 Act, article 64(1).

[1217] Belarus, 1998 Law, article 33; Bosnia and Herzegovina, 2003 Law, article 64(1); Brazil, 1980 Law, article 57; Guatemala, 1986 Decree Law, article 88; Honduras, 2003 Act, article 3(23); Kenya, 1967 Act, article 8(2)(a); Nigeria, 1963 Act, article 22(1); Paraguay, 1996 Law, article 78; Sweden, 1989 Act No. 529, section 8.5; Switzerland, 1999 Ordinance, article 9; and United States, INA, section 250. A State may: (1) expressly allow the alien to choose this option (United States, INA, section 250); (2) expressly leave the choice to the relevant Minister (Kenya, 1967 Act, article 8(2)(a); Nigeria, 1963 Act, article 22(1); and Paraguay, 1996 Law, article 78); or (3) not specify who shall make the choice (Belarus, 1998 Law, article 33; Bosnia and Herzegovina, 2003 Law, article 64(1); Brazil, 1980 Law, article 57; Guatemala, 1986 Decree Law, article 88; Honduras, 2003 Act, article 3(23); Sweden, 1989 Act No. 529, section 8.5; and Switzerland, 1999 Ordinance, article 9).

[1218] United States, INA, section 241(b)(1)(C), (2)(D) (but only when the destination State would be the alien's State of nationality).

[1219] A State may allow the alien to choose this option (Republic of Korea, 1992 Act, article 64(2)(1)-(2)), or may not specify who shall make the choice (Portugal, 1998 Decree-Law, article 21(1)).

[1220] See *Mackeson*, note 1060 above, p. 252 ("Although the immigration officer was not obliged to select that person's country of origin, circumstances might be such that it was appropriate for him to do so, for that country might be the one most likely to receive him."); *Mohamed and Another*, note 221 above, pp. 469-500; *Residence Prohibition Order Case (1)*, Federal Republic of Germany, Superior Administrative Court of Münster, 24 September 1968, *International Law Reports*, volume 61, E. Lauterpacht, C.J. Greenwood (ed.), pp. 431-433; *Chan v. McFarlane*, Canada, Ontario High Court, 5 January 1962, *International Law Reports*, volume 42, E. Lauterpacht (ed.), pp. 213-218.

[1221] See, e.g., *United States Ex Rel. Tom Man v. Shaughnessy*, United States, District Court, Southern District, New York, 16 May 1956, *International Law Reports*, 1956, H. Lauterpacht (ed.), pp. 397-401, at p. 400 ("While in most cases it might be presumed that 'the country in which he was born' had consented to accept a deportable alien, such a presumption, by itself, could not withstand the facts of this case."); and *United States Ex Rel. Hudak v. Uhl*, District Court, Northern District, New York, 1 September 1937, *Annual Digest and Reports of Public International Law Cases*, years 1935-1937, H. Lauterpacht (ed.), Case No. 161, pp. 342-344, at p. 343 ("It is a strange contention that there are any limitations upon the power of a sovereign nation to deport an alien to his native country, who has unlawfully entered the United States, whether such entry was directly from his native country or through some other country."). But see *Aronowicz v. Minister of the Interior*, Appellate Division of the Supreme Court, 15 November and 12 December 1949, *International Law Reports*, 1950, H. Lauterpacht (ed.), Case No. 79, pp. 258-259, at p. 259 ("He pointed out that not all States were now willing to receive back their nationals when another State wished to repatriate them…"); *Ngai Chi Lam v. Esperdy*, United States Court of Appeals, Second Circuit, 411 F.2d 310, 4 June 1969, *International Law Reports*, volume 53, E. Lauterpacht (ed.), pp. 536-538 (State of nationality declined to accept deportee).

> "Comparable non-return obligations have since developed under other treaty regimes. For example, the Convention Against Torture (CAT) bars return of a person 'where there are substantial grounds for believing that he would be in danger of being subjected to torture.' Article 3 of the European Convention of Human Rights, which bars torture or cruel, inhuman, or degrading treatment, has long been interpreted to bar return to another country if there is a 'real risk' of torture or inhuman treatment there. Comparable provisions in other human rights treaties are beginning to be read to impose similar non-return obligations. How far such a non-return obligation extends, however, remains unclear. State practice also reflects frequent national decisions to avoid expelling people (who do not meet the 1951 Convention refugee definition) to countries in the midst of severe armed conflict, often through the use of some form of 'temporary protection.' But the practice varies, and debate persists over whether most states involved see this abstention as a matter of legal obligation or instead as a sound use of their discretionary powers."[1272]

(i) International Covenant on Civil and Political Rights

536. The International Covenant on Civil and Political Rights does not expressly provide an obligation not to return a person to a country where there would be a danger of human rights violations. Nonetheless, the Human Rights Committee has interpreted the Covenant to include such an obligation.

537. In its General Comment No. 31, the Human Rights Committee indicated that States Parties to the Covenant were under an obligation to abstain from transferring an individual, by means of expulsion, extradition[1273] or otherwise, to a State where he or she would be at risk of "irreparable harm" or from where he or she would be transferred to another country in which he or she would face the same risk.

> "[T]he article 2 obligation requiring that States Parties respect and ensure the Covenant Rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there

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357). See also Giorgio Malinverni, "I Limiti all'Espulsione Secondo la Convenzione Europea dei Diritti dell'Uomo", *in* Francesco Salerno (ed.), *Diritti Dell'Uomo, Estradizione ed Espulsione*, CEDAM, Padua, Italy, 2003, pp. 165-182.

[1272] David A. Martin, "The Authority and Responsibility of States" *in* Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 31-45, at pp. 37-38 (citations omitted) (quoting article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1468 U.N.T.S. 85).

[1273] Concerning extradition, see Inter Inter-American Convention to Prevent and Punish Torture, Cartagena de Indias, Colombia, 9 December 1985, *International Legal Materials*, vol. 25, 1986, p. 519, article 13, para. 4: "Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State."

(b) State of residence

513. The national laws of some States provide for the expulsion of aliens to the State in which the alien has a residence or in which the alien resided prior to entering the expelling State.[1222] The expelling State may establish this destination as the primary option,[1223] a secondary option that it may choose,[1224] or an alternative secondary option.[1225]

(c) State of passport issuance

514. An alien may be returned to the State which issued his or her passport in two different situations. The passport may be evidence of the nationality of the alien. In such a case, the alien is in fact returned to the State of nationality. However, States may issue passports to non-nationals. In such a case, the alien may be returned to the State that issued the passport since returnability would appear to be considered an essential element of a valid passport. The significance of the passport as evidence of the nationality and the "returnability" of an alien in the event of expulsion has been discussed as follows:

> "The fact that an alien is or is not returnable to some other State is frequently a crucial matter in the determination of whether he is to be permitted to enter a foreign country. If it is subsequently found that the alien is 'undesirable', then the State will try to deport him elsewhere and practical difficulties may arise if he has no passport or if no other State is willing to issue him with one. So in one case, the Supreme Court of Brazil found that the expulsion of a Romanian national could not be implemented because of the Romanian Government's refusal to issue him with a passport. Today there exists a strong body of authority for the proposition that the actual possession of a passport indicates the existence of a duty, binding on the issuing State, to readmit the holder if he is expelled from another State and has nowhere else to go.
>
> "This duty is often recognized in treaties and is even on occasion extended to cover those whose passports have expired, or who possess alternative documentary evidence of nationality. For example, by an agreement concluded in 1961, Austria and the Federal Republic of Germany agreed to accept each other's nationals if a presumption were established as to the individual's nationality. Such presumption might be based on a passport, even if expired or wrongly issued, or on some other travel or identity document. Expired

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[1222] Belarus, 1998 Law, article 19; Japan, 1951 Order, article 53(2)(1)-(2); Republic of Korea, 1992 Act, article 64(2)(1); and United States, INA, section 241(b)(1)(C)(iii), (2)(E)(iii). A State may establish this destination as a tertiary option that it may choose (United States, INA, section 241(b)(2)(E)(iii)).

[1223] Belarus, 1998 Law, article 19.

[1224] United States, INA, section 241(b)(1)(C) (but only when the destination State would be the alien's State of nationality).

[1225] A State may allow the alien to choose this option (Republic of Korea, 1992 Act, article 64(2)(1)-(2)).

> are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated in articles 6 and 7 of the Covenant,[1274] either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."[1275]

538. In its General Comment No. 20, the Human Rights Committee enunciated the same principle in relation to the prohibition of torture or cruel, inhuman or degrading treatment or punishment, set forth in article 7 of the International Covenant on Civil and Political Rights.

> "In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end."[1276]

539. In the *Kindler v. Canada* case, the Human Right Committee was called upon to consider whether Canada had infringed article 6 (1) of International Covenant concerning the right to life by extraditing an individual to the United States where he could be subject to the death penalty. Although

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[1274] Article 6 of the Covenant provides:

"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

"2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

"3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

"4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

"5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

"6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

Article 7 provides:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[1275] Human Rights Committee (International Covenant on Civil and Political Rights), General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, para. 12.

[1276] Rights Committee (International Covenant on Civil and Political Rights), General Comment No. 20: Prohibition of Torture and Cruel Treatment or Punishment, 10 March 1992, para. 9.

passports also figure prominently in the 1957 European Agreement on the Movement of Persons as a sufficient guarantee of returnability, even if the nationality of the holder is under dispute.

> "This issue of returnability is, furthermore, clearly related to the question of the passport as evidence of nationality. In fact there is no rule of customary international law which prohibits the issue of passports to non-nationals. Indeed, there are many precedents in favour of the practice, both political and humanitarian ... In other cases, passports may be issued to individuals who have been granted asylum or who, for political reasons, are unable to obtain one from their own government. Clearly, such documents cannot declare the nationality of the holder with authority, but, if they are to be recognized by other States as valid travel documents, the guarantee of returnability is essential. […]
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> "State practice, particularly in the form of the provisions of municipal law, insists upon returnability as essential to the validity of a travel document. It is accepted that the passport is itself sufficient evidence of this guarantee, even though it may be equivocal on the issue of nationality. Although the passport is primarily an instrument which emanates from municipal law, in this one respect at least its effect is dictated by a rule of customary international law. […]
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> "Similarly, the fact of possessing a passport in no way assures the entry of the *holder* into the State of issue; for the guarantee of returnability demanded by the rule of customary international law relates to obligations owed between States alone."[1226]

515. The national laws of some States provide for the expulsion of aliens to the State which issued travel documents to the alien.[1227] The expelling State may establish this destination as the primary option,[1228] an alternative primary option[1229] or an alternative secondary option.[1230]

[1226] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 45-46 and 50 (emphasis in original), citing, *inter alia*, *Feldman* v. *Justica Publica*, Ann. Dig. 1938-40, Case No. 144; 414 U.N.T.S. 211; 1954 Agreement between Sweden and the Federal Republic of Germany: 200 U.N.T.S. 39; 1954 Agreement between Denmark and the Federal Republic of Germany, 200 U.N.T.S. 53; 1958 Agreement between Belgium and the Netherlands: 330 U.N.T.S. 84; 1962 Agreement between Austria and France, 463 U.N.T.S. 173; and Article 5 of the European Agreement on the Movement of Persons between Member States of the Council of Europe (European Treaty Series, No. 25).

[1227] France, Code, article L513-2(2); Italy, 1998 Decree-Law No. 286, article 10(3), 1998 Law No. 40, article 8(3); Nigeria, 1963 Act, article 17(1)(c)(ii); Portugal, 1998 Decree-Law, article 21(1); and Tunisia, 1968 Law, article 5.

[1228] Italy, 1996 Decree Law, article 7(3); and Nigeria, 1963 Act, article 17(1)(c).

[1229] Italy, 1998 Law No. 40, article 8(3). A State may not specify who shall make the choice (Italy, 1998 Law No. 40, article 8(3)).

[1230] A State may not specify who shall make the choice (Portugal, 1998 Decree-Law, article 21(1)).

(d) State of embarkation

516. The national laws of some States provide for the expulsion of aliens to the State of embarkation.[1231] The expelling State may return an alien to the State (1) from which the alien entered the expelling State's territory or in which the alien boarded the entry vessel;[1232] or (2) which is the alien's State of "origin" (when this is not expressly distinguished from the alien's State of nationality).[1233] The expelling State may establish this destination as the primary option[1234] an alternative primary option,[1235] the secondary option,[1236] an alternative secondary option that the alien may choose[1237] or a tertiary option that the alien may choose.[1238]

[1231] "A common practice of national immigration authorities is to look first to the place where the alien embarked for the territory of the deporting State. Apart from being a logical course, this choice is sometimes dictated by the legal obligation of the carrier to the deporting State, which extends no further than re-transportation of deportees to the place whence they joined that carrier. Where the country of embarkation indicates in advance that it is unwilling to receive the alien, other destinations must be sought." Ivan Anthony Shearer, *Extradition in International Law,* Manchester, University Press, 1971, p. 77-78. "The United States Attorney-General may order deportation to the country from whence the alien came or to the foreign port at which he embarked for the United States or a contiguous foreign territory, but as interpreted this means deportation to the country of birth." D. P. O'Connell, *International Law*, vol. 2, 2nd ed., London, Stevens & Sons, 1970, pp. 710-711 (citation omitted).

[1232] Belarus, 1998 Law, articles 19, 33; Bosnia and Herzegovina, 2003 Law, article 64(1); Canada, 2001 Act, article 115(3); Guatemala, 1986 Decree Law, article 88; Honduras, 2003 Act, article 3(23); Italy, 1998 Decree-Law No. 286, articles 10(3), 13(12), 1998 Law No. 40, articles 8(3), 11(12), 1996 Decree Law, article 7(3); Japan, 1951 Order, article 53(2)(3); Kenya, 1967 Act, article 8(2)(a); Panama, 1960 Decree-Law, article 59; Paraguay, 1996 Law, article 78; Portugal, 1998 Decree-Law, article 21(1); Republic of Korea, 1992 Act, article 64(2)(3); Sweden, 1989 Act No. 529, section 8.5; Switzerland, 1999 Ordinance, article 9; and United States, INA, sections 241(b)(1)(A)-(B), (2)(E)(i)-(ii), 250.

[1233] Brazil, 1980 Law, article 57; and Lithuania, 2004 Law, article 129(1).

[1234] Canada, 2001 Act, article 115(3); Portugal, 1998 Decree-Law, article 21(1); and United States, INA, section 241(b)(1)(A)-(B).

[1235] Belarus, 1998 Law, article 33; Bosnia and Herzegovina, 2003 Law, article 64(1); Brazil, 1980 Law, article 57; Guatemala, 1986 Decree Law, article 88; Honduras, 2003 Act, article 3(23); Italy, 1998 Law No. 40, article 8(3); Kenya, 1967 Act, article 8(2)(a); Lithuania, 2004 Law, article 129(1); Panama, 1960 Decree-Law, article 59; Paraguay, 1996 Law, article 78; Sweden, 1989 Act No. 529, section 8.5; Switzerland, 1999 Ordinance, article 9; and United States, INA, section 250. A State may: (1) expressly allow the alien to choose this option (United States, INA, section 250); (2) expressly leave the choice to the relevant Minister (Kenya, 1967 Act, article 8(2)(a), (3); Panama, 1960 Decree-Law, article 59; and Paraguay, 1996 Law, article 78); or (3) not specify who shall make the choice (Belarus, 1998 Law, article 33; Bosnia and Herzegovina, 2003 Law, article 64(1); Brazil, 1980 Law, article 57; Guatemala, 1986 Decree Law, article 88; Honduras, 2003 Act, article 3(23); Italy, 1998 Law No. 40, article 8(3); Lithuania, 2004 Law, article 129(1); Sweden, 1989 Act No. 529, section 8.5; and Switzerland, 1999 Ordinance, article 9).

[1236] Italy, 1998 Decree-Law No. 286, article 13(12), 1998 Law No. 40, article 11(12), 1996 Decree Law, article 7(3).

[1237] Japan, 1951 Order, article 53(2)(3); and Republic of Korea, 1992 Act, article 64(2)(3).

[1238] United States, INA, section 241(b)(2)(E)(i)-(ii).

517. A State may limit the range of choices under this heading to those destination States falling under a special arrangement or agreement.[1239] A State may place conditions on the choice of a contiguous or adjacent State,[1240] specifically apply this heading to aliens holding transitory status,[1241] and, in the case of protected persons, choose an alternative State if the destination State has rejected the alien's claim for refugee protection.[1242]

518. The State of embarkation may be distinguished from a transit State.[1243]

(e) State party to a treaty

519. A State may assume the obligation to receive aliens who are nationals of other States parties to a treaty.[1244] The duty of a State to admit aliens who are nationals of another State may be provided for

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[1239] Italy, 1996 Decree Law, article 7(3).

[1240] United States, INA, section 241(b)(1)(B).

[1241] Italy, 1998 Decree-Law No. 286, article 10(3).

[1242] Canada, 2001 Act, article 115(3).

[1243] "In any event, it is clear that a country of transit (as distinguished from a country where the individual had enjoyed a significant period of lawful residence) is not obligated by general international law to accept return of someone who passed through that territory, or even who remained for a fairly lengthy period. Nonetheless, in recent decades states have increasingly negotiated bilateral or regional readmission treaties applicable to such transit situations, often in connection with broader regimes determining the state responsible for considering an asylum application. An important example is the Dublin Convention of 1990. Sometimes these arrangements are viewed as helping to enforce an asserted principle of the country of first asylum, but no clear principle of this type is supported by state practice. Nonetheless, even in the absence of a readmission agreement, a state may take an asylum applicant's prior stay in a third state into account in deciding whether to grant asylum (such grant decisions are ultimately discretionary). That is, State C, asked to provide asylum to a national who is at risk of persecution in State A, might properly take into account that person's sojourn and apparent protection in State B, and could deny asylum on that ground. But in these circumstances, State B is under no obligation, absent some other specific readmission pledge, to accept return. The principle of *non-refoulement,* as embodied in Article 33 of the Convention relating to the Status of Refugees, would not permit State C to return the individual to State A. He may well wind up remaining indefinitely on the territory of C, despite the refusal of asylum." David A. Martin, "The Authority and Responsibility of States" *in* Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 31-45, p. 42 (citing, *inter alia*, the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention), 15 June 1990, *Official Journal* C. 254/1 (1997), reprinted *in* 30 *ILM* 425 (1991)).

[1244] "States may, however, by treaty confer on each other's nationals a right to enter their territories, especially in treaties of commerce and friendship, which often entitle the foreign nationals concerned not merely to enter the state but to establish themselves in business there. It is, further, not uncommon for a group of countries which have close economic or cultural ties to allow nationals of one country freedom for certain purposes to enter all other countries of the group (as has been done between the countries of the European Economic Community, the Nordic countries and, formerly, at least to some extent, the Commonwealth), and to create themselves a common passport area in which passport and immigration controls at their internal frontiers are in bilateral treaties or multilateral treaties. The States parties to such a treaty may retain the right to deny admission or entry to such aliens under certain circumstances provided for in the relevant treaty. Thus, the nature and extent of the duty a State to admit aliens would depend upon the terms of the treaty, which may vary.[1245]

520. The limited duty of States to admit aliens who are nationals of other States parties pursuant to multilateral treaties relating to establishment or the constituent instruments of international organizations has been discussed as follows:

> "A particular duty to admit aliens may, however, result from international treaties. … [I]n specific cases bilateral and multilateral treaties have created an obligation on States to admit aliens. In particular, there are treaties on establishment containing such an obligation, e.g. the European Convention on Establishment of December 15, 1955 (Art. 1; ETS 19). But even those treaties usually contain a restrictive provision under which, in spite of the general obligation, the admission can be limited or even excluded if otherwise the protection of public security and order, or the health of the population, would be endangered. Generally, the reasonableness of such grounds for excluding aliens is to be decided by the refusing State itself, unless the parties to the treaty have accepted arbitration of the issue. Conventions founding international organizations may also create the right of foreigners to freely enter the territories of the members of the organization, as in the case of the European Economic Community. The members of the Community are under the duty to guarantee freedom of movement of the nationals of the member States to seek employment and engage in economic activities. But these treaties, too, admit some restrictions since they also contain special clauses which may be invoked by the States concerned if vital interests are endangered. Under the Treaty establishing the European Economic Community, the Court of Justice of the

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abolished (as has been done by the Nordic and Benelux countries). Even where a treaty does not directly impose on a state an obligation to allow entry to aliens, it may (particularly in the field of human rights) indirectly impose such an obligation on it, for example, where refusal of entry to an alien whose family is already in the state would involve failure to comply with a treaty obligation to respect family life." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 898-899 (referring to, *inter alia*, the Treaty establishing the EEC, 1957; the Protocol concluded on 22 May 1954 between Denmark, Finland, Norway and Sweden (UNTS, 199, p. 29) (Iceland acceded in 1955); the Convention between Denmark, Finland, Norway and Sweden concerning the Waiver of Passport Control at the Intra-Nordic Frontier, 1957 (UNTS, 322, p. 245) (Iceland became a party effective from 1966), as modified by a further agreement in 1979: RG, 84 (1980), p. 376; and the Convention between Belgium, the Netherlands and Luxembourg, Concerning the Transfer of Entry and Exit Controls to the External Frontiers of the Benelux Territory, 1960 (UNTS, 374, p. 3)).

[1245] "Provisions for the admissions of aliens in treaties of friendship, commerce, and navigation are qualified by references to 'public order, morals, health or safety'." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 498 (quoting a treaty between the United States and Italy of 1948). "Where specific treaties exist, e.g. agreements on establishment or a special legal order such as the law of the European Economic Community (EEC), either an unlimited or a qualified duty of a State to provide for admission of citizens of each contracting party or member State may be stipulated." Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 104.

European Communities is competent to decide finally and with binding force whether such escape clauses have been applied arbitrarily. Whether an individual right to enter foreign territory arises from treaty obligations, or whether an obligation only between the partners to the treaty has been created, must be decided according to the circumstances. Generally, only an obligation between States arises; the arrangement under the European Community affirming individual rights is an exception, as the respective provisions have been recognized as directly applicable by the European Court. Although in treaty law no generally recognized prohibition of discrimination exists, it may be expressly introduced. If this is not the case, the freedom to conclude treaties entails the right of a State to admit only certain foreigners in the exercise of its discretion."[1246]

521. The Treaty Establishing the European Community, in its articles 39 and 43, provides as follows:

"Article 39

"1. Freedom of movement for workers shall be secured within the Community.

"2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

"3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

"4. The provisions of this article shall not apply to employment in the public service.

[...]

"Article 43

[1246] Karl Doehring, "Aliens, Admission", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, 1985, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 107-109, at pp. 108-109.

"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

"Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."[1247]

522. The Convention between Denmark, Finland, Norway and Sweden concerning the Waiver of Passport Control at the Intra-Nordic Frontiers, adopted in 1957, provides for the waiver of passport control with respect to their frontiers in cases involving the expulsion of their respective nationals as follows:

"Article 9 – A Contracting State shall not allow an alien who has been expelled (*utvisad*) from another Contracting State to enter without a special permit. Such a permit is, however, not required if a State which has expelled an alien wishes to expel him via another Nordic State.

"If an alien who has been expelled from one Nordic State has a residence permit for another Nordic State, that State is obliged, on request, to receive him.

"Article 10 – Each Contracting State shall take back an alien who, in accordance with Article 6 (*a*) and, as far as entry permit is concerned, 6 (*b*), as well as 6 (*f*), ought to have been refused entry by the State concerned at its outer frontier and who has travelled from that State without a permit into another Nordic State.

"Likewise an alien shall be taken back who, without a valid passport or a special permit, if such is required, has travelled directly from one Nordic State to another.

"The foregoing shall not apply in the case of an alien who has stayed in the State wishing to return him for at least one year from the time of his illegal entry into that State or who has, after entering illegally, been granted a residence and/or work permit there ...

"Article 12 – What has been stipulated in this Convention about an expelled (*utvisad*) alien shall also apply to an alien who, according to Finnish or Swedish law, has been turned away or expelled in the other manners stipulated in the said laws (*förvisning or förpassning*), without a special permit to return." [1248]

[1247] Consolidated version of the Treaty Establishing the European Community, *Official Journal of the European Communities*, C/325/33, 24 December 2002, paras. 39 and 43.

(f) Consenting and other States

523. The national laws of some States provide for the expulsion of aliens to consenting and other States. A State may return an alien to any State,[1249] or to one which will accept the alien or which the alien has a right to enter.[1250] A State may provide such a destination when the alien would face persecution in the original destination State,[1251] or when the alien holds protected status in the expelling State and the original destination State has rejected the alien's claim for refugee status.[1252] A State may establish this destination as an alternative primary option,[1253] an alternative secondary option[1254] or an option of last resort.[1255]

524. The expelling State may send the alien to any consenting receiving State. The receiving State may consent to receive an alien in a particular case. This consent may be subject to limitations such as the reservation of the right of the receiving State to return the alien to the expelling State.[1256]

[1248] Convention between Denmark, Finland, Norway and Sweden concerning the Waiver of Passport Control at the Intra-Nordic Frontiers, Copenhagen, 12 July 1957, United Nations, *Treaty Series*, vol. 322, No. 4660, pp. 282-293, at p. 290.

[1249] Canada, 2001 Act, article 115(3); Sweden, 1989 Act No. 529, section 8.5; and Switzerland, 1999 Ordinance, article 9.

[1250] Brazil, 1980 Law, article 57; Guatemala, 1986 Decree Law, article 88; Honduras, 2003 Act, article 3(23); Kenya, 1967 Act, article 8(2)(a); Lithuania, 2004 Law, article 129(1); Nigeria, 1963 Act, article 22(1); Panama, 1960 Decree-Law, article 59; Paraguay, 1996 Law, article 78; Portugal, 1998 Decree-Law, articles 21(1), 104(3); and United States, INA, sections 241(b)(1)(C)(iv), (2)(E)(vii), 507(b)(2)(B).

[1251] Belarus, 1998 Law, article 33; and Portugal, 1998 Decree-Law, article 104(3).

[1252] Canada, 2001 Act, article 115(3).

[1253] Brazil, 1980 Law, article 57; Guatemala, 1986 Decree Law, article 88; Honduras, 2003 Act, article 3(23); Kenya, 1967 Act, article 8(2)(a); Lithuania, 2004 Law, article 129(1); Panama, 1960 Decree-Law, article 59; Paraguay, 1996 Law, article 78; and Switzerland, 1999 Ordinance, article 9. A State may: (1) require the alien's consent to the destination State selected (Kenya, 1967 Act, article 8(2)(a)); (2) leave the choice to the relevant Minister (Nigeria, 1963 Act, article 22(1); Panama, 1960 Decree-Law, article 59; and Paraguay, 1996 Law, article 78); or (3) not specify who shall make the choice (Brazil, 1980 Law, article 57; Guatemala, 1986 Decree Law, article 88; Honduras, 2003 Act, article 3(23); Lithuania, 2004 Law, article 129(1); and Switzerland, 1999 Ordinance, article 9).

[1254] Portugal, 1998 Decree-Law, article 21(1), which does not specify who shall make the choice.

[1255] Canada, 2001 Act, article 115(3); Sweden, 1989 Act, section 8.5; and United States, INA, section 241(b)(1)(C)(iv), (2)(E)(vii).

[1256] "Since a state need not receive aliens at all, it can receive them only under certain conditions." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 899 (citation omitted).

525. The right of a State to decide whether to permit aliens to enter its territory is consistent with the principles of the sovereign equality, the territorial integrity and the political independence of States recognized in Article 2, paragraphs 1 and 4, of the Charter of the United Nations.[1257] A State does not therefore have a duty to admit aliens into its territory in the absence of a treaty obligation,[1258] such as those relating to human rights or economic integration.[1259]

526. The right of a State to decide whether or not to admit an alien is recognized in general terms in article I of the Convention on Territorial Asylum:

> "Every State has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable, without, through the exercise of this right, giving rise to complaint by any other State." [1260]

[1257] "By customary international law no state can claim the right for its nationals to enter into, and reside on, the territory of a foreign state. The reception of aliens is a matter of discretion, and every state is, by reason of its territorial supremacy, competent to exclude aliens from the whole, or any part, of its territory." Ibid., pp. 897-898 (citations omitted).

[1258] "No state is under a duty to admit aliens into its territory. The state may prohibit the entry of aliens into its territory, or accept them only in such cases and on such conditions as it may deem proper to prescribe *(Ekiu* v. *U.S.*, 142 U.S. 651 (1892); see Vattel, *Le Droit des gens*, 1758, liv. ii, sect. 94)." Shigeru Oda, "Legal Status of Aliens", *in* Max Sørensen (dir.), *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, at p. 481. "In principle this is a matter of domestic jurisdiction: a state may choose not to admit aliens or may impose conditions on their admission." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 498 (citation omitted). "A state is under no duty, in the absence of treaty obligations, to admit aliens to its territory. If it does admit them, it may do so on such terms and conditions as may be deemed by it to be consonant with its national interests. Likewise a state may deport from its territory aliens whose presence therein may be regarded by it as undesirable. These are incidents of sovereignty." Green Haywood Hackworth, *Digest of International Law*, vol. III, chapters IX – XI, Washington, Government Printing Office, 1942, p. 717. See also Hurst Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht, Martinus Nijhoff Publishers, 1987, p. 61. "Under general international law no state is obliged to admit aliens into its territory." Hans Kelsen, *Principles of International Law* (Revised and Edited by Robert W. Tucker), 2nd ed., Holt, Rinehart and Winston, Inc, 1966, p. 366. "The right of every State to regulate the entry of aliens into its territory is an attribute of its sovereignty. Like other State rights, this right is limited by international law. A State has the competence either to admit a person into its territory or to deny to it such admission, provided that its laws and regulations on these topics conform to customary international law and to international agreements." Sohn, p. 46.

[1259] "It has long been a principle of international customary law that states are free to control the entry and residence of aliens into their territory. The absence of any duty to admit aliens in classical international law is supported by the practice of most states and by states' immigration laws, and finds its origins in the principle of sovereignty or territorial supremacy. However, this freedom has come to be increasingly limited under contemporary international law, in particular by treaties and principles of general international law in the areas of human rights and economic integration." Hélène Lambert, note 83 above, p. 11 (citations omitted).

[1260] Convention on Territorial Asylum, Caracas, 28 March 1954, United Nations, Treaty Series, vol. 1438, No. 24378, p. 127.

527. The Inter-American Convention on the Status of Aliens recognizes that every State has the right to establish the conditions under which foreigners may enter its territory.[1261]

528. The right of a State to decide whether to admit aliens has also been recognized in international jurisprudence.

529. In the *Ben Tillet Case*, the Arbitral Tribunal expressly recognized the right of a State to deny entry to an alien who, based on a sovereign appreciation of the facts, appears to represent a threat to national security:

> "Considering that it cannot be denied that a State has the right to prohibit entry into its territory by aliens whose conduct or presence is deemed by the State to constitute a threat to its security; that, moreover, a State has full sovereignty in evaluating the facts justifying the interdiction."[1262]

530. The European Court of Human Rights has characterized the right of a State to determine the entry of aliens as a matter of well-established international law as follows:

> "[…] the Contracting States' concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens".[1263]

531. As early as 1891, the United States Supreme Court held that every sovereign nation had the power to decide whether to admit aliens and under what conditions as a matter of international law.

> "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of

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[1261] Article 1: "States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory".

[1262] Affaire Ben Tillett (Grande-Bretagne/Belgique), sentence arbitrale du 26 décembre 1898, in G. Fr. de Martens, Nouveau Recueil Général de Traités et autres actes relatifs aux rapports de droit international, Deuxième série, Tome XXIX, Leipzig, Librairie Dieterich Theodor Weicher, 1903, pp. 244-273, at p. 269.

[1263] *Case of Moustaquim v. Belgium*, European Court of Human Rights, Judgment (Merits and Just Satisfaction), 18 February 1991, Application No. 12313/86, para. 43. See also *Case of Vilvarajah and others v. United Kingdom*, European Court of Human Rights, Judgment (Merits), 30 October 1991, Application numbers 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, para. 102; *Case of Chahal v. United Kingdom*, European Court of Human Rights, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 73; *Case of Ahmed v. Austria*, European Court of Human Rights, Judgment (Merits and Just Satisfaction), 17 December 1996, Application No. 25964/94, para. 38; *Case of Bouchelkia v. France*, European Court of Human Rights, Judgment (Merits), 29 January 1997, Application No. 23078/93, para. 48; and *Case of H.L.R. v. France*, European Court of Human Rights, Judgment (Merits), 29 April 1997, Application No. 24573/94, para. 33.

> foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[1264]

532. In 1906, the right of a State to decide whether to admit aliens, even those who are nationals of friendly States, was recognized by the Judicial Committee of the Privy Council in *Att.-Gen. for Canada* v. *Cain*, as follows:

> "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests."[1265]

3. Limitations on the expulsion of an alien to a particular State

(a) The principle of *non-refoulement*

533. The principle of *non-refoulement* was recognized in the 1951 Convention relating to the Status of Refugees, adopted in response to the atrocities committed during the Second World War.[1266] The principle of *non-refoulement* prohibits the return or *refoulement* of refugees to States in which their life or freedom would be threatened because of persecution on certain grounds. The term "*non-refoulement*" may be considered to be a term of art which applies only to refugees. Thus, the principle of *non-refoulement* strictly speaking may be limited in two respects. First, this principle would apply to only one specific category of aliens, namely, refugees.[1267] Secondly, this principle would prohibit return or *refoulement* only in situations involving a threat to life or freedom resulting from persecution on specific grounds.[1268]

[1264] *Nishimura Ekiu v. United States et al.*, Supreme Court of the United States, 18 January 1892, 142 U.S. 651 (citation omitted). See also *Chae Chae Chan Ping v. United States*, Supreme Court of the United States, 13 May 1889, 130 U.S. 581, 603, 604 ("Jurisdiction over its own territory to that extent [to exclude aliens] is an incident of every independent nation. It is part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.").

[1265] [1906] A.C. 542 at p. 546.

[1266] Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150, article 33.

[1267] A refugee may be generally understood as an alien who has a well-founded fear of persecution for reasons of race, religion, nationality, membership in a social group or political opinion and is unable or unwilling to obtain protection from the State of nationality. For a discussion of the meaning of the term "refugee", *see* Part IV.A.6.

[1268] For a discussion of the principle of *non-refoulement* in relation to refugees, *see* Part X.E.2(b)-(e).

534. There are different views concerning the extent to which the principle of "*non-refoulement*" has attained a broader application as a consequence of humanitarian concerns or human rights law.[1269] This question has been discussed in detail as follows:

> "While the formal requirements of *non-refoulement* may be limited to Convention refugees, the *principle of refuge* is located within the body of general international law. It encompasses those with a well-founded fear of being persecuted, or who face a substantial risk of torture; it equally includes those who would face other 'relevant harm'. The limited protection due springs from objective conditions, wherever the facts are such as to indicate a serious risk of harm befalling those compelled to flee for *valid reasons* including war, violence, conflict, violations of human rights or other serious disturbance of public order.
>
> "The juridically relevant situation of need flows from objectively verifiable evidence confirming the causes for flight, and the circumstance of danger facing specific groups or individuals. This essential factual base makes individualized inquiries into persecution or harm redundant. At the same time, host community interests are protected, within the principle of refuge, by the exclusion of, for example, those who have persecuted others, who are serious criminals or threats to *ordre public*, or who, on their own admission, are motivated by reasons of purely personal convenience.
>
> "A combination of legal and humanitarian principle imposes significant limitations on the return of individuals to countries in which they may face inhumane or degrading treatment, or where their readmission is uncertain and their security precarious. Notwithstanding some of the rhetoric and recent exceptions, particularly in Europe with regard to asylum seekers from countries beyond the region, such as Iran and Sri Lanka, practice reveals a significant level of general agreement not to return to danger those fleeing severe internal upheavals or armed conflict in their own countries. What is disputed is the extent to which, if at all, any international legal obligation is involved.
>
> "Despite the concerns of States and various exceptions in recent years, nearly four decades of practice contain ample recognition of a humanitarian response to refugees falling outside the 1951 Convention. Whether practice has been sufficiently consistent over time, and accompanied by the *opinio juris* essential to the emergence of a customary rule of refuge, is possibly less certain, even at the regional level.

[1269] "Irrespective of the status of individuals as refugees, a restriction with regard to return (and also to expulsion) appears to derive, under international law, from the requirement to protect the individuals' life and personal security in the process. Thus return should not be effected if it involves creating a danger to these paramount values, for instance by turning away a boat that is not seaworthy." Giorgio Gaja, note 28 above, p. 291. See also Brian Gorligk, "The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees", International Journal of Refugee Law, vol. 11, 1999, pp. 479-495; Kay Hailbronner, "Non-Refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?", *Virginia Journal of International Law*, vol. 26, 1985-1986, pp. 857-896; and Deborah Perluss and J. F. Hartman, "Temporary Refuge: Emergence of a Customary Norm", *Virginia Journal of International Law*, vol. 26, 1985-1986, pp. 551-626.

> "In part, a strictly normative approach is misconceived, for international legal obligations deriving from human rights treaties, among others, have clearly influenced the practice, and have constrained States' freedom of action. In that process, the obligations themselves have developed, even if what emerges at the present time is an incomplete relation of rights and duties. The primary responsibility for the protection of human rights rests on the territorial State; other States do not automatically assume or share in that responsibility when they remove non-nationals to their own country. So far as a State's actions may forcibly return an individual to the risk of violation of basic human rights, however, its responsibility is duty-driven, rather than strictly correlative to any individual 'right'. What exactly this entails in terms of policies, practices, State conduct and international responsibility still needs to be worked out, especially in the relation of States to UNHCR and its institutional role."[1270]

(b) The prohibition of expulsion to certain States under human rights law

535. There would appear to be increasing recognition of an obligation not to expel a person to a State where they would be in danger of a serious human rights violations such as torture.[1271] This development has been discussed as follows:

[1270] Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Oxford, Clarendon Press, 1996, pp. 170-171 (citations omitted, emphasis in original).

[1271] "Where the procedure of expulsion itself constitutes an encroachment upon human rights, the expulsion itself, even if reasonably justified, must be characterized as contrary to international law. A State expelling an alien into a country where such a violation is likely to take place would commit a breach of international law." Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107, at p. 104. "The expulsion and deportation into a State in which the expelled individual is threatened by inhumane persecution may also violate human rights and would only be lawful if the expelling government did not have other means at its disposal to protect State security. Even special treaties which prohibit exposing an alien to political persecution by a foreign government generally contain such a restriction (e.g. Convention relating to the Status of Refugees, Art. 33)." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, vol. 1, 1992, pp. 109-112, at p. 111. "While the principle of *non-refoulement* applies only to refugees who may be persecuted in their home country because of race, religion or other special reasons, and prohibits their deportation to that country, similar restrictions may be derived from the international human rights law. A State should not deport a person to another State where life or liberty is likely to be in danger. Such action would not be different from sending a person on a boat to a shark-infested area and pushing him or her into the sea. Either action would clearly violate basic humanitarian principles." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 89-90 (citations omitted). "Expulsion and deportation violate human rights guarantees if they are undertaken by the expelling State with full knowledge of the fact that the expellee runs a very serious risk of being tortured in the country to whose territory he or she is sent to. This concept has been recognized by the European Commission of Human Rights in the *Amekrane* case as part of the prohibition of torture and inhuman treatment as early as 1973. Since then. it has become the basis for a rich case law by the European Court on Human Rights that recognizes a right to protection against inhuman return as part of Article 3 ECHR. On the universal level the principle has been codified as a specific human rights guarantee in Article 3(1) of the 1984 Convention against Torture ..." Walter Kälin, note 277 above, p. 154 (referring to Application No. 5961/72, *Amekrane* v. *United Kingdom*, *Yearbook of the European Convention on Human Rights*, 1973, p.

the case concerned extradition, the Committee's consideration of the obligation of non-return would appear to be equally applicable to expulsion.[1277]

> "[I]f a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant."[1278]

(ii) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(1) Prohibition of expulsion to certain States

540. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) expressly prohibits the expulsion of a person to a State where he or she would be in danger of torture. Article 3 provides as follows:

> "1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> "2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."[1279]

[1277] "While the first decisions of both the European Court and the Human Rights Committee that took the perspective now under consideration concerned extradition, there is a clear analogy between extradition and expulsion under this respect, unless the individual to be expelled is given the opportunity of choosing the country of destination. Most recent cases of prospective infringements of human rights in the State of destination concern expulsion rather than extradition." Giorgio Gaja, note 28 above, pp. 301-302 (citing *Soering*, Judgement of 7 July 1989, *Publications of the European Court of Human Rights*, Series A, Vol. 161 at 35-36 and 44-45 (paras. 91 and 111); Human Rights Committee (International Covenant on Civil and Political Rights), *Kindler v. Canada*, Views adopted on 30 July 1993. Communication No. 470/1991. I *International Human Rights Reports* (1994) 2-98, 101 (paras. 6.2 and 14); and Human Rights Committee (International Covenant on Civil and Political Rights), *Ng v. Canada* case, Views adopted on 5 November 1993, Communication No. 469/1991, I *International Human Rights Reports* (1994), pp. 2-161 (para. 16).).

[1278] Human Rights Committee (International Covenant on Civil and Political Rights), *Kindler v. Canada*, Views adopted on 30 July 1993. Communication No. 470/1991. *International Human Rights Reports* (1994), pp. 2-98 and 101, para. 6.2. In the *Kindler v. Canada* case, the Committee concluded that there had been no infringement of the right to life under article 6, paragraph 1 of the International Covenant. In a similar case, *Ng v. Canada*, the Committee concluded that the extradition infringed the prohibition of inhuman or degrading punishment under article 7 of the International Covenant because of the manner in which the death penalty would have been carried out. *Ng v. Canada* case, Views adopted on 5 November 1993, Communication No. 469/1991, *International Human Rights Reports* (1994), pp. 2-161.

[1279] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 113.

(2) Committee against Torture

541. The Committee against Torture established pursuant to the Convention has considered a number of communications alleging that the expulsion of aliens to a particular State was contrary to article 3.[1280] In some cases, the Committee against Torture has found that the expulsion of an alien would violate this prohibition and that the State party therefore had an obligation to refrain from expelling the alien, for example: *Mutombo v. Switzerland*;[1281] *Khan v. Canada*;[1282] *Kisoki v. Sweden*;[1283] *Tala v. Sweden*;[1284] *Paez v. Sweden*;[1285] *Aemei v. Switzerland*;[1286] *A.F. v. Sweden*;[1287] *Ayas v. Sweden*;[1288]

[1280] See, in particular, article 17 and article 22.

[1281] Communication No. 13/1993, 27 April 1994.

[1282] Communication No. 15/1994, 15 November 1994. The Committee found that Khan had been previously tortured and political activists such as Khan would be in danger of being subject to torture. "The Committee, however, considers that, even if there could be some doubts about the facts as adduced by the author, it must ensure that his security is not endangered. The Committee notes that evidence exists that torture is widely practised in Pakistan against political dissenters as well as against common detainees." Communication No. 15/1994, para. 12.3.

[1283] Communication No. 41/1996, 8 May 1996.

[1284] Communication No. 43/1996, 15 November 1996. The Committee considered Tala's political affiliation and activities, his history of detention and torture and the serious human rights situation in the Islamic Republic of Iran. Communication No. 43/1996, paras. 10.3-10.4. The Committee also distinguished between the law of the State party and its application to the present case. Communication No. 43/1996, 15 November 1996, para. 10.2.

[1285] Communication No. 39/1996, 28 April 1997.

[1286] Communication No. 34/1995, 9 May 1997. The Committee noted the declaratory nature of its finding of a violation of article 3 and suggested that the State party could pursue legal or political solutions. "The Committee's finding of a violation of article 3 of the Convention in no way affects the decision(s) of the competent national authorities concerning the granting or refusal of asylum. The finding of a violation of article 3 has a *declaratory character*. Consequently, the State party is not required to modify its decision(s) concerning the granting of asylum; on the other hand, it does have a responsibility to find solutions that will enable it to take all necessary measures to comply with the provisions of article 3 of the Convenuon. These solutions may be of a legal nature (e.g. decision to admit the applicant temporarily), but also of a political nature (e.g. action to find a third State willing to admit the applicant to its territory and undertaking not to return or expel him in its turn)." Communication No. 34/1995, para. 11 (emphasis in original).

[1287] Communication No. 89/1997, 3 September 1997. The Committee considered the author's family background, his political affiliation and activities, his history of detention and torture and the serious human rights situation in the Islamic Republic of Iran. The Committee concluded that the expulsion violated article 3. Communication No. 89/1997, paras. 6.5-6.6.

[1288] Communication No. 97/1997, 12 November 1998. "In the circumstances the Committee considers that, given the human rights situation in Turkey, the author's political affiliation and activities with the PKK as well as his history of detention and torture constitute substantial grounds for believing that he would be at risk of being arrested and subjected to torture if returned to Turkey. In the light of the above, the Committee is of the view that the State party has an obligation, in conformity with article 3 of the Convention, to refrain from

Korban v. Sweden;[1289] *Haydin v. Sweden*;[1290] *Elmi v. Australia*;[1291] *A.S. v. Sweden*;[1292] *Karoui v. Sweden*;[1293] *Ms. T.A. v. Sweden*;[1294] *Dadar v. Canada*;[1295] and *Rios v. Mexico*.[1296] In other cases, the Committed against Torture has found that the expulsion of an alien which had already been carried out violated article 3, for example: *Arana v. France*;[1297] *Agiza v. Sweden*;[1298] *Brada v. France*.[1299] The latter cases may raise procedural issues relating to the expulsion of aliens which are discussed below.[1300]

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forcibly returning the author to Turkey or to any other country where he runs a real risk of being expelled or returned to Turkey." Communication No. 97/1997, paras. 6.6 and 7.

[1289] Communication No. 88/1997, 16 November 1998.

[1290] Communication No. 101/1997, 20 November 1998. "In the author's case, the Committee considers that the author's family background, his political activities and affiliation with the PKK, his history of detention and torture, as well as indications that the author is at present wanted by Turkish authorities, should be taken into account when determining whether he would be in danger of being subjected to torture upon his return. In the circumstances, the Committee considers that substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Turkey. In the light of the above, the Committee is of the view that the State party has an obligation to refrain from forcibly returning the author to Turkey, or to any other country where he runs a real risk of being expelled or returned to Turkey." Communication No. 101/1997, paras. 6.7-6.9.

[1291] Communication No. 120/1998, 14 May 1999.

[1292] Communication No. 149/1999, 6 November 1999. "It is also noted that the author claims that she was forced into a *sighe* or *mutah* marriage and to have committed and been sentenced to stoning for adultery. […] The Committee notes, *inter alia*, the report of the Special Representative of the Commission on Human Rights on the situation of human rights in [the Islamic Republic of] Iran (E/CN.4/2000/35) of 18 January 2000, which indicates that although significant progress is being made in Iran with regard to the status of women in sectors like education and training, 'little progress is being made with regard to remaining systematic barriers to equality' and for 'the removal of patriarchal attitudes in society'. It is further noted that the report, and numerous reports of non-governmental organizations, confirm that married women have recently been sentenced to death by stoning for adultery." Communication No. 149/1999, paras. 8.4 and 8.7.

[1293] Communication No. 185/2001, 8 May 2002. The Committee addressed issues relating to sufficiency of evidence and the burden of proof. "However, in view of the substantive reliable documentation he has provided, including medical records, a support letter from Amnesty International, Sweden, and an attestation from the Al-Nahdha chairman, the complainant should be given the benefit of the doubt, since he has provided sufficient reliable information for the burden of proof to shift." Communication No. 185/2001, para. 10.

[1294] Communication No. 226/2003, 27 May 2005.

[1295] Communication No. 258/2004, 5 December 2005.

[1296] Communication No. 133/1999, 17 December 2004.

[1297] Communication No. 63/1997, 9 November 1999.

[1298] Communication No. 233/2003, 24 May 2005. *See* Part VII.C.3(d).

[1299] Communication No. 195/2002, 24 May 2005. *See* Part VII.C.3(d).

[1300] See Part VIII.

(3) Relevant considerations

542. The Committee against Torture has adopted guidelines with respect to the implementation of article 3 in its General Comment No. 1.[1301] These guidelines indicate the information that may be relevant in determining whether the expulsion of an alien to a particular State in consistent with article 3:

> "8. The following information, while not exhaustive, would be pertinent:
>
> "(a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see art. 3, para. 2)?
>
> "(b) Has the author been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
>
> "(c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
>
> "(d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
>
> "(e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?
>
> "(f) Is there any evidence as to the credibility of the author?
>
> "(g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?"[1302]

543. The Committee against Torture has also considered whether the State of destination is a party to the Torture Convention and has accepted the competence of the Committee with respect to receiving individual communications in reviewing expulsion cases under article 3.[1303]

[1301] Committee Against Torture, General Comment No. 1: Implementation of article 3 of the Convention in the context of article 22, A/53/44, annex IX, CAT General Comment No. 01 (General Comments), 21 November 1997.

[1302] Ibid., para. 8.

[1303] See, e.g., *Mutombo v. Switzerland*, Committee against Torture, Communication No. 13/1993, 27 April 1994; and *Khan v. Canada*, Communication No. 15/1994, 15 November 1994. "The Committee Against Torture has considered as a relevant source of risk also the fact that the State of destination was not a State party to the Torture Convention. … This circumstance cannot per se be a decisive factor of risk. Many States have not

(4) Substantial grounds

544. The Committee has indicated that *substantial grounds* for believing that there is a risk of torture requires more than a mere theory or suspicion but less than a high probability of such a risk as follows:

> "6. Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable." [1304]

(5) Personal risk of torture

545. In its General Comment No. 1, the Committee against Torture has indicated that the person who is subject to expulsion must be in danger of being tortured in the State of destination as follows:

> "1. Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention."

546. In *Mutombo v. Switzerland*, the Committee indicated that there must be substantial grounds for believing that the individual concerned would be *personally at risk* of being tortured if expelled to a particular State:

> "The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that Mr. Mutombo would be in danger of being subjected to torture. In reaching this conclusion, the Committee must take into account all relevant considerations, pursuant to paragraph 2 of article 3, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being

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resorted to torture years before the Convention against Torture entered into force. On the other hand, the fact that a State is a party to the Convention is no guarantee that the obligations will not be infringed. One may only assume that the possibility that individuals might apply to the Committee Against Torture, albeit for a non-binding assessment, contributes to some extent to ensure a State's compliance with its obligations under the Convention." Giorgio Gaja, note 28 above, pp. 283-314, at p. 304 (commenting on *Khan v. Canada*).

[1304] Committee Against Torture, note 1301 above, para. 6. See *Mutombo v. Switzerland*, in which the Committee affirmed the requirement that there be "substantial grounds for believing that Mr. Mutombo would be in danger of being subjected to torture". *Mutombo v. Switzerland*, Views adopted on 27 April 1994, Committee against Torture, Communication No. 13/1993. 1 *International Human Rights Reports I* (1994) 3-122 at 128 (para. 9.3). See also *Haydin v. Sweden*, Committee against Torture, Communication No. 101/1997, 20 November 1998, para. 6.5, in which the Committee recalled that "the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he is returned" and that the requirement of necessity and predictability should be interpreted in the light of paragraph 6 of General Comment No. 1.

> subjected to torture in the country to which he would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances."[1305]

547. The Committee concluded[1306] that the expulsion of Mr. Mutombo to Zaire would violate the principle of *non-refoulement* based, *inter alia*, on (1) the alien's ethnic background, alleged political affiliation and detention history;[1307] (2) the pattern of human rights violations in Zaire;[1308] and (3) the fact that Zaire was not a party to the Convention and the author would not be subject to further protection by the Committee.[1309]

[1305] *Mutombo v. Switzerland*, Views adopted on 27 April 1994, Committee against Torture, Communication No. 13/1993, 1 *International Human Rights Reports 1* (1994) 3-122, para. 9.3. The Committee has reiterated this standard in subsequent cases concerning expulsion. See, e.g., *Khan v. Canada*, Committee against Torture, Communication No. 15/1994, 15 November 1994, para. 12.2; *Kisoki v. Sweden*, Communication No. 41/1996, 8 May 1996, para. 9.2; *Tala v. Sweden*, Communication No. 43/1996, 15 November 1996, para. 10.1; *Paez v. Sweden*, Communication No. 39/1996, 28 April 1997, para. 14.2; *Ayas v. Sweden*, Communication No. 97/1997, 12 November 1998, para. 6.3; *Korban v. Sweden*, Communication No. 88/1997, 16 November 1998, para. 6.3; *Haydin v. Sweden*, Communication No. 101/1997, 20 November 1998, para. 6.3; *A.D. v. The Netherlands*, Communication No. 96/1997, 12 November 1999, para. 7.2.; U.S. v. Finland, para. 7.3; *Ms. T.A. v. Sweden*, Communication No. 226/2003, 27 May 2005, para. 7.2; and *Ms. M.C.M.V.F. v. Sweden*, Communication No. 237/2003, 12 December 2005, para. 6.3. In *Brada v. France*, the Committee also recalled "that, according to its General Comment on article 3 of the Convention, it gives 'considerable weight' to the findings of national authorities." *Brada v. France*, Communication No. 195/2002, 24 May 2005, para. 13.2.

[1306] *Mutombo v. Switzerland*, Views adopted on 27 April 1994, Communication No. 13/1993. 1 *International Human Rights Reports I* (1994) 3-122, para. 9.7.

[1307] "The Committee considers that in the present case substantial grounds exist for believing that the author would be in danger of being subjected to torture. The Committee has noted the author's ethnic background, alleged political affiliation and detention history as well as the fact, which has not been disputed by the State party, that he appears to have deserted from the army and to have left Zaire in a clandestine manner and, when formulating an application for asylum, to have adduced arguments which may be considered defamatory towards Zaire. The Committee considers that, in the present circumstances, his return to Zaire would have the *foreseeable and necessary consequence* of exposing him to a real risk of being detained and tortured." Ibid., para. 9.4 (emphasis added).

[1308] Moreover, the belief that 'substantial grounds' exist within the meaning of article 3, paragraph 1, is strengthened by 'the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights', within the meaning of article 3, paragraph 2. The Committee is aware of the serious human rights situation in Zaire… The Committee cannot but conclude that a consistent pattern of gross, flagrant or mass violations does exist in Zaire and that the situation may be deteriorating." Ibid., paras. 9.4 and 9.5.

[1309] "Moreover, the Committee considers that, in view of the fact that Zaire is not a party to the Convention, the author would be in danger, in the event of expulsion to Zaire, not only of being subjected to torture but of no

548. In *Rios v. Canada*, the Committee against Torture reiterated the requirement of a personal risk of being subject to torture for purposes of rendering an expulsion contrary to article 3.

> "The Committee … stresses that recent reports on the human rights situation in Mexico have concluded that although efforts have been made to eliminate torture, many cases of torture are still reported. However, in line with the reasoning previously advanced, although it might be possible to assert that there still exists in Mexico a pattern of human rights violations, that in itself would not constitute sufficient cause for finding that the complainant was likely to be subjected to torture on his return to Mexico; additional reasons must exist indicating that the complainant would be personally at risk. […]
>
> "The Committee also takes note of, and attaches due weight to, the evidence and arguments put forward by the complainant concerning his personal risk of being subjected to torture: the fact that he has been arrested and tortured in the past because he was suspected of having links with EZLN; the scars he continues to bear as a result of acts of torture which he suffered; the fact that the conflict between the Mexican Government and the Zapatista movement is not yet over and that some members of his family are still missing. In the light of the foregoing and after due deliberation, the Committee considers that there is a risk of the complainant being arrested and tortured again on returning to Mexico."[1310]

(6) Present and foreseeable danger

549. In its General Comment No. 1, the Committee against Torture indicated that there must be a *present* danger of torture under the prevailing circumstances in the State of destination at the time of expulsion.

> "7. The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present. …"

550. In *A.D. v. the Netherlands*, the Committee against Torture found that the person was at risk of expulsion even though he had requested an extension of his residence permit for medical treatment since the expulsion order was still in force.[1311] The Committee indicated that the danger of the person

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longer having the legal possibility of applying to the Committee for protection." Ibid., para. 9.6. The Committee has considered this to be a relevant factor in other cases concerning expulsion. See, for example, *Khan v. Canada*, Communication No. 15/1994, para. 12.5 (Pakistan was not a Party); *Korban v. Sweden*, Communication No. 88/1997, 16 November 1998, para. 7 (Jordan was a party to the Convention, but had not made a declaration under article 22 recognizing the competence of the Committee).

[1310] *Rios v. Canada*, Committee against Torture, Communication No. 133/1999, 17 December 2004, paras. 8.3-8.6.

[1311] "The Committee notes the State party's information that the author at present does not risk expulsion, pending the consideration of the author's request for extension of his residence permit for medical treatment. Noting that the order for the author's expulsion is still in force, the Committee considers that the possibility that the State party will grant the author an extended temporary permit for medical treatment is not sufficient to fulfil being subjected to torture was to be assessed under the present circumstances. The Committee concluded that the expulsion of the alien to Sri Lanka would not constitute a violation of article 3 under circumstances prevailing at the time due to a shift in the political authority of the State of destination.

> "The Committee considers that the author's activities in Sri Lanka and his history of detention and torture are relevant when determining whether he would be in danger of being subjected to torture upon his return. … However, the Committee also notes that the harassment and torture to which the author was allegedly subjected was directly linked to his exposure of human rights violations taking place while the previous Government was in power in Sri Lanka. The Committee is aware of the human rights situation in Sri Lanka but considers that, given the shift in political authority and the present circumstances, the author has not substantiated his claim that he will personally be at risk of being subjected to torture if returned to Sri Lanka at present."[1312]

551. Similarly, in *U.S. v. Finland*, the Committee against Torture concluded that the expulsion of the alien to Sri Lanka would not violate article 3 because of the improved situation in the State of destination, including the ongoing peace process; the absence of systematic human rights violations; the opinion of the Office of the United Nations High Commissioner for Refugees that persons of Tamil origin, such as the petitioner, were not refugees and could be returned; and the fact that the petitioner had not been politically active for almost 20 years.[1313] The Committee recalled that "the individual concerned must face a *foreseeable and real risk* of being subjected to torture in the country to which he/she is being returned, and that this danger must be personal and present."[1314] [Emphasis added.]

552. In contrast, in *Kisoki v. Sweden*, the Committee against Torture concluded that the expulsion of Ms. Kisoki to Zaire would violate article 3 based on (1) her political affiliation and activities; (2) her history of detention and torture; and (3) information provided by UNHCR concerning the situation with respect to returning refugees who were believed to have a political profile as compared to refugees in general.[1315]

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the State party's obligations under article 3 of the Convention." *A.D. v. The Netherlands*, Committee against Torture, Communication No. 96/1997, 12 November 1999, para. 7.3.

[1312] Ibid., para. 7.4.

[1313] Communication No. 197/2002, 7 January 2002, para. 7.7. Finland also noted that the person claimed to have been tortured years ago, his health had improved and treatment for his current medical condition would be available in Sri Lanka (para. 7.6).

[1314] Ibid., para. 7.8.

[1315] Communication No. 41/1996, 8 May 1996, paras. 9.3-10. "In the circumstances, the Committee need not take into consideration the general situation of returned refugee claimants, but rather the situation of returned refugee claimants who are active members of the opposition to the Government of President Mobutu." Communication No. 41/1996, 8 May 1996, para. 9.4.

553. In *Ms. M.C.M.V.F. v. Sweden*, the Committee against Torture concluded that the expulsion of the person would not violate article 3 because of the improved situation in El Salvador. In this regard, the Committee noted that (1) the alleged torture occurred during an internal armed conflict and when there was a pattern of human rights violations; (2) the person had been a member of a guerrilla movement (Frente Farabundo Martí para la Liberación Nacional) which was presently the majority political party in the Parliament; and (3) the incidents complained of were not linked to her political activities or her husband's. The Committee therefore concluded that there was no real, personal and foreseeable risk of torture as a result of deportation.[1316]

554. In contrast, in *Mrs. T.A. v. Sweden*, the Committee against Torture concluded that the expulsion of the person and her daughter would violate article 3 notwithstanding a change in the political party in power since the person had recently been tortured apparently for political reasons and was a member of an opposition party:

> "The Committee has noted the State party's contention that since the Awami League is currently in political opposition, the risk for the complainant to be exposed to harassment by the authorities at the instigation of members of the party no longer exists. The State party further argues that the complainant does not have anything to fear from the political parties now in power, since she is a member of one of the parties represented in Congress. However, the State party has not contested that the complainant had in the past been persecuted, detained, raped and tortured. The Committee notes the complainant's statement that she belongs to a faction of the Jatiya Party which is in opposition to the ruling party, and that torture of political opponents is frequently practiced by state agents. Furthermore, the acts of torture to which the author was subjected to, appear not only to have been inflicted as a punishment for her involvement in political activities, but also as a retaliation for the political activities of her husband and his presumed involvement in a political crime. The Committee also notes that her husband is still in hiding, that the torture to which she was subjected occurred in a recent past and has been medically certified, and that the complainant is still being searched by the police in Bangladesh."[1317]

[1316] "The Committee observes that the acts of torture that the complainant allegedly suffered occurred in 1989 and 1991, when El Salvador was mired in internal armed conflict, and when there was a pattern of massive and gross human rights violations in the country. The Committee notes that the general situation of El Salvador has changed since the Peace Accords came into effect in 1992. The FMLN, formerly a guerrilla group, is now a political party which won the majority of seats in the 2003 parliamentary elections. The Committee has not been persuaded that the incidents that concerned the complainant in 2000 and 2003 were linked in any way to her previous political activities or those of her husband ... Notwithstanding the occurrence of violence and confrontation in El Salvador, the Committee is not persuaded that the complainant or any members of her family would face a *real, personal, and foreseeable risk* of torture if deported from Sweden." Communication No. 237/2003, 12 December 2005, para. 6.4 (emphasis added).

[1317] Communication No. 226/2003, 27 May 2005, para. 7.3.

555. In *Dadar v. Canada*, the Committee against Torture concluded that the expulsion of Mr. Dadar would violate article 3, even though the previous torture and imprisonment was not in the recent past, based on his continuing involvement with Iranian opposition forces.[1318]

(7) State officials

556. In its General Comment No. 1, the Committee against Torture indicated that the reference to a pattern of human rights violations refers only to violations involving public officials or persons acting in an official capacity:

> "3. Pursuant to article 1, the criterion, mentioned in article 3, paragraph 2, of 'a consistent pattern or gross, flagrant or mass violations of human rights' refers only to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[1319]

557. In *Ms. M.C.M.V.F. v. Sweden*, the Committee against Torture concluded that the expulsion of the person would not violate article 3 partly because the incidents were not attributable to State agents or groups acting as State agents.[1320]

558. In *Elmi v. Australia*, the Committee against Torture considered the meaning of the phrase "public officials or other persons acting in an official capacity" for purposes of the definition of torture contained in article 1 of the Torture Convention. The Committee concluded that the person would be in danger of torture by "public officials" even if the State of destination did not have a central government.

> "The Committee does not share the State party's view that the Convention is not applicable in the present case since, according to the State party, the acts of torture the author fears he would be subjected to in Somalia would not fall within the definition of torture set out in article 1 (i.e. pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, in this instance

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[1318] Communication No. 258/2004, 5 December 2005, para. 8.6.

[1319] Committee against Torture, General Comment No. 1: on the implementation of Article 3 of the Convention in the context of Article 22, 21 November 1997, para. 3, document A/53/44, annex IX. See also *Dadar v. Canada*, Committee against Torture, Communication No. 258/2004, 5 December 2005, para. 8.4.; *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, 14 May 1999, para. 6.5; *H.M.H.I. v. Australia*, Communication No. 177/2001, 1 May 2002, para. 6.4; and *S.S. v. The Netherlands*, Communication No. 191/2001, 5 May 2003, para. 6.4: "The issue of whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without consent or acquiescence of the Government falls outside the scope of Article 3 of the Convention unless the non-governmental entity occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned."

[1320] "The Committee has not been persuaded that the incidents that concerned the complainant in 2000 and 2003 were linked in any way to her previous political activities or those of her husband, and considers that the complainant has failed to prove sufficiently that those incidents be attributable to state agents or to groups acting on behalf of or under the effective control of state agents." Communication No. 237/2003, 12 December 2005, para. 6.4.

for discriminatory purposes). The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity' contained in article 1.

"The State party does not dispute the fact that gross, flagrant or mass violations of human rights have been committed in Somalia. Furthermore, the independent expert on the situation of human rights in Somalia, appointed by the Commission on Human Rights, described in her latest report (13) the severity of those violations, the situation of chaos prevailing in the country, the importance of clan identity and the vulnerability of small, unarmed clans such as the Shikal, the clan to which the author belongs.

"The Committee further notes, on the basis of the information before it, that the area of Mogadishu where the Shikal mainly reside, and where the author is likely to reside if he ever reaches Mogadishu, is under the effective control of the Hawiye clan, which has established quasi-governmental institutions and provides a number of public services. Furthermore, reliable sources emphasize that there is no public or informal agreement of protection between the Hawiye and the Shikal clans and that the Shikal remain at the mercy of the armed factions.

"In addition to the above, the Committee considers that two factors support the author's case that he is particularly vulnerable to the kind of acts referred to in article 1 of the Convention. First, the State party has not denied the veracity of the author's claims that his family was particularly targeted in the past by the Hawiye clan, as a result of which his father and brother were executed, his sister raped and the rest of the family was forced to flee and constantly move from one part of the country to another in order to hide. Second, his case has received wide publicity and, therefore, if returned to Somalia the author could be accused of damaging the reputation of the Hawiye."[1321]

(8) Subsequent expulsion to a third State

559. In its General Comment No. 1, the Committee against Torture has indicated that the consideration of the State of destination for purposes of article 3 includes not only the initial State of destination but also the possibility of subsequent expulsion from that State to a third State.

"2. The Committee is of the view that the phrase 'another State' in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited."

[1321] *Elmi v. Australia*, Communication No. 120/1998, 14 May 1999, paras. 6.5-6.8.

560. In *Mutombo v. Switzerland*, the Committee expressed the view that Switzerland had "an obligation to refrain from expelling Balabou Mutombo to Zaire, or to any other country where he runs a real risk of being expelled or returned to Zaire or of being subjected to torture."[1322]

561. In *Korban v. Sweden*, the Committee against Torture found substantial grounds for believing that Korban would be in danger of being subjected to torture if returned to Iraq based on the serious human rights situation in Iraq, his history of detention in that country and his son's defection from the army.[1323] The Committee indicated that the prohibition of expulsion to "another State" where such a danger exists applies not only to the initial State of destination but also to possible expulsion from that State to a third State.

> "The Committee notes that the Swedish immigration authorities had ordered the author's expulsion to Jordan and that the State party abstains from making an evaluation of the risk that the author will be deported to Iraq from Jordan. It appears from the parties' submissions, however, that such risk cannot be excluded, in view of the assessment made by different sources, including UNHCR, based on reports indicating that some Iraqis have been sent by the Jordanian authorities to Iraq against their will, that marriage to a Jordanian woman does not guarantee a residence permit in Jordan and that this situation has not improved after the signature of a Memorandum of Understanding between the UNHCR and the Jordanian authorities regarding the rights of refugees in Jordan. The State party itself has recognized that Iraqi citizens who are refugees in Jordan, in particular those who have been returned to Jordan from a European country, are not entirely protected from being deported to Iraq.
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> "In the light of the above, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation to refrain from forcibly returning the author to Iraq. It also has an obligation to refrain from forcibly returning the author to Jordan, in view of the risk he would run of being expelled from that country to Iraq. In this respect the Committee refers to paragraph 2 of its general comment on the implementation of article 3 of the Convention in the context of article 22, according to which 'the phrase "another State" in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited'. Furthermore, the Committee notes that although Jordan is a party to the Convention, it has not made the declaration under article 22. As a result, the author would not have the possibility of submitting a new communication to the Committee if he was threatened with deportation from Jordan to Iraq."[1324]

[1322] *Mutombo v. Switzerland*, Views adopted on 27 April 1994, Communication No. 13/1993. 1 *International Human Rights Reports 1* (1994) 3-122, para. 10.

[1323] *Korban v. Sweden*, Communication No. 88/1997, 16 November 1998, para. 6.4.

[1324] Ibid., paras. 6.5 and 7.

(9) Absolute prohibition

562. The Torture Convention expressly provides that there is no exception to the prohibition against torture even for reasons of war or other public emergency under article 2.[1325] The Torture Convention also provides an absolute prohibition of expulsion which is not subject to limitation or derogation, even for reasons of national security, under article 3. This is in contrast to the principle of *non-refoulement* with respect to refugees, which is subject to derogation for reasons of national security, conviction of a serious crime or danger to the community.[1326]

563. In *Paez v. Sweden*, the Committee against Torture considered the case of a member of Shining Path, an organization of the Communist Party of Peru.[1327] Sweden noted the terrorist character of Shining Path, contended that crimes committed for that organization should not constitute a reason for granting asylum and referred to article 1(F) of the Convention relating to the Status of Refugees.[1328] Sweden also noted that the person was free to leave at any time for a country of his choice.[1329] The Committee concluded that Sweden had an absolute obligation not to expel the alien to Peru under article 3 of the Torture Convention as compared to the Refugee Convention.

> "It appears from the State party's submission and from the decisions by the immigration authorities in the instant case, that the refusal to grant the author asylum in Sweden is based on the exception clause of article 1 F. of the 1951 Convention relating to the Status of Refugees. […] The Committee considers that the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a

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[1325] Article 2, paragraph 2: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

[1326] Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150, art. 31. "In addition to prohibiting *refoulement* of persons facing persecution, the Refugee Convention, the Torture Convention, and comparable provisions of some regional instruments prohibit states from deporting or extraditing persons in such circumstances. However, under Article 32 of the Refugee Convention, aliens may be expelled for reasons of national security and public order, and such expulsions may be ordered without a hearing for the refugee if 'compelling reasons of national security' so require. No such exception exists in the African Refugee Convention. Likewise, under the Torture Convention and the ECHR, no one may be sent to any country where they would be subject to torture. There is no exception for national security." David Fisher et al., note 130 above, p. 119 and nn. 240-241 (citing the Torture Convention, art. 3; the ECHR, art. 3; and *Case of Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, at paras. 79-80).

[1327] *Paez v. Sweden*, Communication No. 39/1996, 28 April 1997, para. 2.1.

[1328] Ibid., para. 6.3.

[1329] Ibid., para. 6.5.

> determination under article 3 of the Convention. […] [T]he Committee considers that the grounds invoked by the State party to justify its decision to return the author to Peru do not meet the requirements of article 3 of the Convention."[1330]

564. Moreover, in *Dadar v. Canada*, the Committee recalled that the prohibition of article 3 was absolute and that national security concerns did not provide an exception.

> "In the present case, it notes that the Canadian authorities made an assessment of the risks that the complainant might face if he was returned and concluded that he would be of limited interest to the Iranian authorities. However, the same authorities did not exclude that their assessment proved to be incorrect and that the complainant might indeed be tortured. In that case, they concluded that their finding regarding the fact that the complainant presented a danger to the Canadian citizens should prevail over the risk of torture and that the complainant should be expelled from Canada. The Committee recalls that the prohibition enshrined in article 3 of the Convention is an absolute one."[1331]

565. In 2004, the General Assembly, in its resolution 59/182, recalled the prohibition of the expulsion of a person to a State where that person would be in danger of being tortured.

> "The General Assembly
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> "*Recalling* that freedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right that must be protected under all circumstances, including in times of internal or international disturbance or armed conflict, and that the prohibition of torture is explicitly affirmed in all relevant international instruments,
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> "*Recalling also* that a number of international, regional and domestic courts, including the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, have recognized that the prohibition of torture is a peremptory norm of international law,
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> […]

[1330] Ibid., paras. 14.4-14.6. "The Torture Convention expressly prohibits Member States from returning an alien to a state that would torture him. … There is no security limitation on the right of *non-refoulement* in the Torture Convention and the treaty expressly disavows any possibility of derogation. The Committee Against Torture (the monitoring body for the Torture Convention) has criticized the laws of several states that provide for such an exception. The Committee has also made clear that the bases for exclusion from refugee status enumerated in Article 1(F) of the Convention Relating to the Status of Refugees are inapplicable to the Torture Convention, insisting that '[t]he test of Article 3 of the [Torture Convention] is absolute.'" David Fisher et al., note 130 above, pp. 107-108 and nn. 135-143 (citing Torture Convention, art. 2(2) and 3; CAT/C/SR.12 21 and 27; CAT/C/SR.13 27; Summary of the 126th Session: New Zealand, at 51, 30 September 1993, UN Doc. No. CAT/C/SR.126; CAT/C/24/8 8 and 22; *Paez v. Sweden*, Communication No. 39/1996, 28 April 1997, paras. 14.4. and 14.5).

[1331] Communication No. 258/2004, 5 December 2005, para. 8.8.

> "8. *Recalls* that States shall not expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture."[1332]

(iii) International Convention on the Elimination of All Forms of Racial Discrimination

566. In 2004, the Committee on the Elimination of Racial Discrimination organized a thematic discussion on the issue of discrimination against non-citizens. Following this discussion, the Committee adopted general recommendation XXX on discrimination against non-citizens. In this recommendation, the Committee recognized the need to clarify the responsibilities of States parties to the Convention on the Elimination of All Forms of Racial Discrimination with respect to non-citizens. The Committee also affirmed general principles concerning the responsibility of States parties relating to the prohibition and elimination of discrimination under article 5. The Committee also recommended with respect to the expulsion and deportation of non-citizens that States parties:

> "[e]nsure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment ..."[1333]

(iv) European Convention on Human Rights

567. The European Convention on Human Rights does not explicitly prohibit the expulsion of an individual to a State where he or she would face the risk of serious human rights violations. However, the European Court of Human Rights has interpreted article 3 of the Convention[1334] as forbidding States parties from sending a person to a country where he or she "faces a real risk of being subjected

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[1332] Operative paragraph 8.

[1333] Committee on the Elimination of Racial Discrimination, note 1154 above, para. 27. Similarly, the Special Rapporteur on the rights of non-citizens, Mr. David Weissbrodt, has also stressed that: "[…] expulsions of non-citizens should not be carried out without taking into account possible risks to their lives and physical integrity in the countries of destination". The rights of non-citizens, note 460 above, para. 28.

[1334] This article provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

to torture or to inhuman or degrading treatment or punishment in the requesting State". According to the Court, this prohibition applies not only to extradition,[1335] but also to expulsion.[1336]

568. In the *Case of Chahal v. United Kingdom*,[1337] the European Court of Human Rights stressed the absolute character of this prohibition and indicated that the individual's behaviour, however undesirable or dangerous, could not be a material consideration in this respect.

> "The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees …"[1338]
>
> "It should not be inferred from the Court's remarks…that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged."[1339]

569. The European Court of Human Rights has drawn from the absolute character of article 3 of the European Convention on Human Rights the conclusion that the said provision also covers cases where the danger for the individual expelled does not emanate from the State of destination itself but from "persons or groups of persons who are not public officials", provided that the State of destination is not able to offer adequate protection to the individual concerned.

[1335] European Court of Human Rights, *Case of Soering v. United Kingdom*, Judgment (Merits and Just Satisfaction), 7 July 1989, Application No. 14038/88, para. 91: "In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting State". With respect to extradition, *see* also article 13, para. 4, of the Inter-American Convention to Prevent and Punish Torture, Cartagena de Indias, Colombia, 9 December 1985, *International Legal Materials*, vol. 25, 1986, p. 519. ("Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.")

[1336] European Court of Human Rights, *Case of Cruz Varas and Others v. Sweden*, Judgment (Merits), 20 March 1991, Application No. 15576/89, paras. 69-70.

[1337] European Court of Human Rights, *Case of Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, paras. 72-107.

[1338] Ibid., para. 80.

[1339] Ibid., para. 81.

> "Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and the authorities of the receiving State are not able to obviate the risk by providing appropriate protection."[1340]

570. The view that article 3 of the European Convention on Human Rights prohibits the expulsion or extradition to countries where torture is practiced or tolerated by governmental bodies was also expressed by the Parliamentary Assembly of the Council of Europe.[1341] Moreover, attention may be drawn to a recommendation in which the Parliamentary Assembly of the Council of Europe expressed the view that:

> "No alien shall be subjected to measures such as rejection at the frontier, return, expulsion or extradition, which would result in compelling him to return to or to remain in either a territory in which he has well-founded fear of being persecuted for reasons of his race, religion, nationality, membership of a particular social group or political opinion, or a territory where he is in danger of being sent to such a territory. He shall have the right to apply to a court or to a high administrative authority."[1342]

571. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe has also recognized the "State's fundamental obligation not to send a person to a country where there are substantial grounds for believing that he/she would run a real risk of being subjected to torture or ill-treatment".[1343]

(v) American Convention on Human Rights

572. The American Convention on Human Rights explicitly prohibits the expulsion of an alien to a country where his or her life or personal freedom would be endangered due to discrimination on certain grounds. Article 22, paragraph 8, provides as follows:

> "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."[1344]

[1340] European Court of Human Rights, *Case of H.L.R. v. France*, Judgment (Merits), 29 April 1997, Application No. 24573/94, para. 40.

[1341] Council of Europe, Parliamentary Assembly, Recommendation 768 (1975) on torture in the world, 3 October 1975, para. 8.

[1342] Council of Europe, note 607 above, para. 13.

[1343] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Thirteenth General Report on the CPT's activities covering the period 1 January 2002 to 31 July 2003, CPT/Inf (2003) 35, 10 September 2003, "Deportation of foreign nationals by air", paras. 27-45, at para. 30.

[1344] The same prohibition is contained in article 22 of the Declaration of San José on Human Rights, signed at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969

(vi) African Charter on Human and Peoples' Rights

573. The African Charter on Human and Peoples' Rights contains a prohibition of torture in article 5. However, the Charter does not address the implications of this prohibition with respect to expulsion. Nonetheless, the African Commission for Human and Peoples' Rights has reaffirmed the principle of *non-refoulement* with respect to torture in cases of expulsion. The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, adopted by the Commission in 2002, provide as follows:

> "D. Non-refoulement
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> "15. States should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture."[1345]

(vii) National legislation

574. The national laws of some States prohibit the expulsion of an alien to a State where the person would be in danger of serious human rights violations or mistreatment. Expulsion may be prohibited when the alien faces or may be sent on to face the death penalty,[1346] torture or other inhuman treatment,[1347] or persecution in a State.[1348] More generally, a State may prohibit deportation to a State where the alien may face or be sent on to face a threat to life or freedom,[1349] torture, corporal punishment or other inhuman or degrading treatment,[1350] or persecution or discrimination on the basis

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("Article 22. Freedom of Movement and Residence […] 8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country or origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.")

[1345] African Commission on Human and Peoples' Rights, Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 32nd ordinary session, Banjul, The Gambia, 17-23 October 2002.

[1346] Finland, 2004 Act, section 147.

[1347] Ibid.; and Switzerland, Federal Constitution, article 25.

[1348] Finland, 2004 Act, section 147.

[1349] Austria, 2005 Act, article 3.50(1); Bosnia and Herzegovina, 2003 Law, article 60; Czech Republic, 1999 Act, section 179(1)(a)(1)-(3); France, Code, article 513-2; Italy, 1996 Decree Law, article 7(3); Lithuania, 2004 Law, article 130(1); Sweden, 1989 Act, section 8.1; Switzerland, 1931 Federal Law, article 14a(4); and United Kingdom, Manual, paragraph 12.3.

[1350] Bosnia and Herzegovina, 2003 Law, article 60; Canada, 2001 Act, article 115(1); Czech Republic, 1999 Act, section 179(1)(a)(2); and Sweden, 1989 Act, section 8.1.

of the alien's race, sex, religion, political opinions or other characteristics.[1351] An alien who has committed certain types of criminal acts may be deprived of all protections under this heading,[1352] or those relating to persecution but not to life or similarly grave dangers.[1353] A State may likewise set aside its protections when the alien (1) threatens its interests;[1354] (2) threatens its *ordre public* or national security, or has violated international law;[1355] or (3) can be sent to a third State.[1356]

(viii) National jurisprudence

575. The issue of the expulsion of an alien to a State where he or she faces the risk of torture[1357] has been addressed by a number of national courts. Some courts have indicated that an alien may never be

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[1351] Austria, 2005 Act, article 3.50(2); Belarus, 1998 Law, article 33; Canada, 2001 Act, article 115(1); France, Code, article 513-2; Italy, 1998 Decree-Law No. 286, article 19(1), 1998 Law No. 40, article 17(1), 1996 Decree Law, article 7(3); Japan, 1951 Order, article 53(3); Lithuania, 2004 Law, article 130(1); Portugal, 1998 Decree-Law, article 104(1)-(2); Republic of Korea, 1992 Act, article 64(3); and Sweden, 1989 Act, section 8.2. A State may apply this protection when the alien faces persecution in the destination State that would justify a grant of asylum in the expelling State (Portugal, 1998 Decree-Law, article 104(1)), or that would violate the terms of an international convention (France, Code, article 513-2; Japan, 1951 Order, article 53(3); Republic of Korea, 1992 Act, article 64(3); Switzerland, 1931 Federal Law, article 14a(3)). The alien may be required to raise such concerns within an allotted period (Portugal, 1998 Decree-Law, article 104(2)).

[1352] Canada, 2001 Act, article 115(2)(a)-(b); Czech Republic, 1999 Act, section 179(2)(b); and Lithuania, 2004 Law, article 130(3).

[1353] Austria, 2005 Act, article 3.50(4)-(5); Sweden, 1989 Act, section 8.2.

[1354] Japan, 1951 Order, article 53(3); and Republic of Korea, 1992 Act, article 64(3).

[1355] Austria, 2005 Act, article 3.50(4)-(5); Canada, 2001 Act, article 115(2)(b); Czech Republic, 1999 Act, section 179(2)(b); France, Code, article L521-2; Japan, 1951 Order, article 53(3); Republic of Korea, 1992 Act, article 64(3); Lithuania, 2004 Law, article 130(3); and Sweden, 1989 Act, section 8.2. A State may require for such protections to be set aside such that the alien cannot be sent to any State other than the original destination State (Czech Republic, 1999 Act, section 179(2)(b); Sweden, 1989 Act, section 8.2), or limit the removal to protections against persecution but not to those against threats to life or bodily integrity (Austria, 2005 Act, article 3.50(4)).

[1356] Czech Republic, 1999 Act, section 179(2)(a).

[1357] Some national courts have distinguished between the types of potential punishments that can affect an expulsion procedure and those that would not. See, e.g., *Sovich v. Esperdy,* United States, Court of Appeals, Second Circuit, 15 May 1963, *International Law Reports*, volume 34, E. Lauterpacht (ed.), pp. 128-131 ("We do not suggest, of course, that all incarceration, whatever its duration or whatever its assigned justification, would constitute physical persecution within the purview of the statute. … We do not suggest that any incarceration for even *political* crimes, such as the one here involved, would constitute physical persecution under § 243 *(h).*"); *Blazina v. Bouchard,* United States, Court of Appeals, Third Circuit, 2 February 1961, *International Law Reports*, volume 32, E. Lauterpacht (ed.), pp. 243-246 ("The repugnance of such a governmental policy to our own concepts of religious freedom cannot, however, justify our labelling such actions as 'physical persecution'.") Moreover, in some United States cases, the State was not considered responsible for assuring that the alien would not be further expelled to third States wherein he or she would risk persecution. See, e.g., *United States ex rel. Tie Sing Eng*, note 730 above; *Chong Chak et Al.* v. *Murff,* 172 F. Supp. 150 (S.D.N.Y. 1958).

expelled to a State where he or she would risk torture,[1358] while other courts have indicated that a balancing test must be applied.[1359] In addressing such situations, national courts have looked to both national and international law for guidance.

576. The Supreme Court of Canada applied a balancing test in *Suresh v. Canada.*[1360] The Court stated as follows:

> "Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil. To repeat, the appropriate approach is essentially one of balancing. The outcome will depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel. On the one hand stands the state's genuine interest in combatting terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security. On the other hand stands Canada's constitutional commitment to liberty and fair process. This said, Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere.
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> [...]
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> "We conclude that the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the *Charter*.

[1358] *Mohamed and Another*, note 221 above; *Secretary of State for the Home Department* v. *Rehman*, Court of Appeal of England, 23 May 2000, *International Law Reports*, volume 124, E. Lauterpacht, C. J. Greenwood, A. G. Oppenheimer (eds.), pp. 511-550 (Hoffman, L. J.) ("A good example is the question, which arose in *Chahal* itself, as to whether deporting someone would infringe his rights under Article 3 of the Convention because there was a substantial risk that he would suffer torture or inhuman or degrading treatment. The European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights under Article 3. If there is a danger of torture, the Government must find some other way of dealing with a threat to national security.").

[1359] *Suresh v. Canada*, note 471 above; *Deportation to U. Case*, note 900 above ("Therefore even if the conditions laid down in Article 14(1), second sentence, *AuslG* are fulfilled, it is still necessary to consider whether the threat posed by the continued presence of the alien in question within federal territory is not actually outweighed by the danger in which he will be put if he is deported."); *R v. Secretary of State*, note 815 above. It should be noted that in response to this last case, the European Court of Human Rights held that no such balancing test was allowed under Article 3 of the European Convention on Human Rights. European Court of Human Rights, *Case of Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para 79 ("The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. … The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases.").

[1360] *Suresh v. Canada*, note 471 above.

> […]
>
> "We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1. (A violation of s. 7 will be saved by s. 1 'only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like': see *Re BCMotor Vehicle Act, supra,* at p. 518; and *New Brunswick (Minister of Health and Community Services)* v. *G (J),* [1999] 3 SCR 46, 177 DLR (4th) 124, at para. 99.) Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Art. 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis."

577. The Constitutional Court of South Africa applied an absolute test in *Mohamed and Another v. President of the Republic of South Africa and Others.*[1361] The Court considered the deportation of an individual to a State where he would incur the death penalty as an infringement on the rights to human dignity, to life and not to be treated or punished in a cruel, inhuman or degrading way. The Court decided the case on the basis of the rights guaranteed by the Constitution of South Africa rather than international law.[1362] The Court noted its divergence from the position taken by the Supreme Court of Canada.

> "But whatever the position may be under Canadian law where deprivation of the right to life, liberty and human dignity is dependent upon the fundamental principles of justice, our Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice. There are no such exceptions to the protection of these rights. Where the removal of a person to another country is effected by the State in circumstances that threaten the life or human dignity of such person, ss 10 and 11 of the Bill of Rights are implicated. There can be no doubt that the removal of Mohamed to the United States of America posed such a threat."[1363]

(c) Health considerations

578. The European Court of Human Rights has interpreted the protection against torture or inhuman or degrading treatment enshrined in article 3 of the European Convention on Human Rights as also applying to the case of an expulsion which seriously affects the health conditions of the individual expelled.

[1361] *Mohamed and Another*, note 221 above (dealing with the right to life, the right to have human dignity respected and protected and the right not to be subjected to cruel, inhuman or degrading punishment by being subjected to the death penalty in the United States).

[1362] Ibid., paras. 37ff.

[1363] Ibid. (Citations omitted).

579. In *Vedran Andric v. Sweden*, the Court of Human Rights indicated that in order to assess whether the expulsion of an alien would be contrary to article 3 consideration should be given to the physical and mental effects of the expulsion as well as the state of health of the individual concerned:

> "[I]n assessing whether a deportation involves such a trauma that it in itself constitutes a breach of Article 3 of the Convention, its physical and mental effects and the state of health of the person concerned are to be taken into account […]"[1364]

580. In the *Case of D. v. United Kingdom*, the Court held:

> "[The Court] is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State."[1365]

581. Thus, with respect to the removal from the United Kingdom of an alien who was suffering from AIDS, the Court indicated:

> "51. The Court notes that the applicant is in the advanced stages of a terminal and incurable illness. At the date of the hearing, it was observed that there had been a marked decline in his condition and he had to be transferred to a hospital. His condition was giving rise to concern. The limited quality of life he now enjoys results from the availability of sophisticated treatment and medication in the United Kingdom and the care and kindness administered by a charitable organisation. He has been counselled on how to approach death and has formed bonds with his carers.
>
> "52. The abrupt withdrawal of these facilities will entail the most dramatic consequences for him. It is not disputed that his removal will hasten his death. There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering. Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts. While he may have a cousin in St Kitts, no evidence has been adduced to show whether

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[1364] European Court of Human Rights, *Case of Vedran Andric v. Sweden*, Decision as to the Admissibility of Application No. 45917/99, The Law, para. 2.

[1365] European Court of Human Rights, *Case of D. v. United Kingdom*, Judgement of 2 May 1997, case number 146/1996/767/964.

> this person would be willing or in a position to attend to the needs of a terminally ill man. There is no evidence of any other form of moral or social support. Nor has it been shown whether the applicant would be guaranteed a bed in either of the hospitals on the island which, according to the Government, care for AIDS patients.
>
> "53. In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3."[1366]

582. In the *Case of Bensaid v. the United Kingdom*, the European Court of Human Rights underlined "the high threshold set by article 3" of the European Convention on Human Rights, and held that given the circumstances of the case, there was no sufficiently real risk shown that the expulsion of the claimant, who was suffering from schizophrenia, would be contrary to the standards of this provision:

> "36. In the present case, the applicant is suffering from a long-term mental illness, schizophrenia. He is currently receiving medication, olanzapine, which assists him in managing his symptoms. If he returns to Algeria, this drug will no longer be available to him free as an outpatient. He does not subscribe to any social insurance fund and cannot claim any reimbursement. It is, however, the case that the drug would be available to him if he was admitted as an inpatient and that it would be potentially available on payment as an outpatient. It is also the case that other medication, used in the management of mental illness, is likely to be available. The nearest hospital for providing treatment is at Blida, some 75 to 80 km from the village where his family live.
>
> "37. The difficulties in obtaining medication and the stress inherent in returning to that part of Algeria, where there is violence and active terrorism, would, according to the applicant, seriously endanger his health. Deterioration in his already existing mental illness could involve relapse into hallucinations and psychotic delusions involving self-harm and harm to others, as well as restrictions in social functioning (such as withdrawal and lack of motivation). The Court considers that the suffering associated with such a relapse could, in principle, fall within the scope of Article 3.
>
> "38. The Court observes, however, that the applicant faces the risk of relapse even if he stays in the United Kingdom as his illness is long term and requires constant management. Removal will arguably increase the risk, as will the differences in available personal support and accessibility of treatment. The applicant has argued, in particular, that other drugs are less likely to be of benefit to his condition, and also that the option of becoming an inpatient should be a last resort. Nonetheless, medical treatment is available to the applicant in Algeria. The fact that the applicant's circumstances in Algeria would be less favourable than those enjoyed by him in the United Kingdom is not decisive from the point of view of Article 3 of the Convention.

[1366] Ibid. (cross-references omitted).

> "39. The Court finds that the risk that the applicant would suffer a deterioration in his condition if he were returned to Algeria and that, if he did, he would not receive adequate support or care is to a large extent speculative. The arguments concerning the attitude of his family as devout Muslims, the difficulty of travelling to Blida and the effects on his health of these factors are also speculative. The information provided by the parties does not indicate that travel to the hospital is effectively prevented by the situation in the region. The applicant is not himself a likely target of terrorist activity. Even if his family does not have a car, this does not exclude the possibility of other arrangements being made.
>
> "40. The Court accepts the seriousness of the applicant's medical condition. Having regard, however, to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. The case does not disclose the exceptional circumstances of *D. v. the United Kingdom* (cited above), where the applicant was in the final stages of a terminal illness, Aids, and had no prospect of medical care or family support on expulsion to St. Kitts.
>
> "41. The Court finds, therefore, that the implementation of the decision to remove the applicant to Algeria would not violate Article 3 of the Convention."[1367]

583. Considerations relating to the effect of an expulsion to a particular country on the health of the alien concerned are also taken into account in the national laws of some States. Thus, for humanitarian reasons an alien otherwise subject to expulsion may be allowed to remain in the territory of the State for at least a limited period of time.[1368] A State may also place conditions on the expulsion of an alien injured while working in its territory,[1369] or when the deportation may have exceptionally grave effects on the alien's health.[1370]

584. In *N (FC) v. Secretary of State for the Home Department*,[1371] the House of Lords considered the case of a Ugandan national suffering from HIV, who had been issued a deportation order. The

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[1367] European Court of Human Rights, *Case of Bensaid v. the United Kingdom*, Judgment, 6 February 2001, Application number 44599/98.

[1368] Argentina, 2004 Act, articles 29, 35; Italy, 1998 Decree-Law No. 286, articles 5(11), 10(4), 1998 Law No. 40, article 8(2)(b); Portugal, 1998 Decree-Law, article 126A(3); and Spain, 2000 Law, article 25(3). A State may specify that such an admission does not constitute legal entry into the State's territory (Argentina, 2004 Act, article 35).

[1369] France, Code, article L521-2(5).

[1370] France, Code, article L523-4.

[1371] *N (FC) v. Secretary of State for the Home Department*, United Kingdom House of Lords, [2005] UKHL 31, 5 May 2005.

question posed was whether article 3 of the European Convention on Human Rights prohibited her expulsion on the ground that returning her to Uganda would constitute "inhuman treatment", since the same medical care would not be available to her there. After reviewing the applicable Strasbourg jurisprudence, the House of Lords held that the expulsion did not violate article 3 of the European Convention, since the strict criteria for violation of article 3 in health cases had not been met. Lord Hope of Craighead described the status of the jurisprudence in the following manner:

> "The conclusion that I would draw from this line of authority is that Strasbourg has adhered throughout to two basic principles. On the one hand, the fundamental nature of the article 3 guarantees applies irrespective of the reprehensible conduct of the applicant. It makes no difference however criminal his acts may have been or however great a risk he may present to the public if he were to remain in the expelling state's territory. On the other hand, aliens who are subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state. For an exception to be made where expulsion is resisted on medical grounds the circumstances must be exceptional. In May 2000 Mr Lorezen, a judge of the Strasbourg court, observed at a colloquy in Strasbourg that it was difficult to determine what was meant by 'very exceptional circumstances'. But subsequent cases have shown that *D v. United Kingdom* is taken as the paradigm case as to what is meant by this formula. The question on which the court has to concentrate is whether the present state of the applicant's health is such that, on humanitarian grounds, he ought not to be expelled unless it can shown that the medical and social facilities that he so obviously needs are actually available to him in the receiving state ..."[1372]

(d) Diplomatic assurances

585. The expulsion of aliens suspected of international terrorist activities has occurred with increasing frequency since the attack on the World Trade Center in New York on 11 September 2001 and similar attacks around the world. In many instances, the State of nationality may be the only State willing to admit such a person. Nonetheless, the expulsion of the person to that State may be precluded if the person would be in danger of torture or other serious mistreatment. Some States have attempted to resolve this situation by obtaining diplomatic assurances from the State concerned that the individual would not be subject to torture or other serious mistreatment.

[1372] Ibid., para. 48.

In some instances, such States have established a procedure for monitoring compliance with the diplomatic assurances.[1373] The legal and practical effect of these diplomatic assurances has been questioned.[1374]

586. In its resolution 1566 (2004), the Security Council called upon States not to provide safe havens for suspected terrorists and at the same time recognized that measures taken by States in order to combat terrorism must comply with international human rights law.

> "The Security Council calls upon states to cooperate fully in the fight against terrorism ... in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates [or] participates in ... the commission of terrorist acts or provides safe havens;

[1373] "Governments around the world have legitimate security concerns in the face of violent terrorist attacks. Some governments, however, are returning alleged terrorist or national security suspects to countries where they are at risk of torture or ill-treatment. Governments have justified such acts by relying on diplomatic assurances—formal guarantees from the government in the country of return that a person will not be subjected to torture upon return. States secure diplomatic assurances in advance of return and claim that by doing so, they comply with the absolute prohibition in international law against returning a person—no matter what his or her alleged crime or status—to a place where he or she would be at risk of torture or ill-treatment. Some states appear to be returning people based on diplomatic assurances with the knowledge that torture will be used upon return to extract information and confessions regarding terrorist activities and associations. Governments sometimes also engage in post-return monitoring of persons they transfer, implying that such monitoring is an additional safeguard against torture." Human Rights Watch, *Empty Promises: Diplomatic Assurances no Safeguard against Torture*, vol. 16, No. 4(D), April 2004, at p. 3 and n. 1 ("The word 'return' includes any process leading to the involuntary return of a non-national either to his or her country of origin or to a third country, including by deportation, expulsion, extradition and rendition.") (other citations omitted).

[1374] "The use of diplomatic assurances is not well-documented and practice appears to vary among states, regions, and legal jurisdictions. Few jurisdictions expressly provide for the use of diplomatic assurances in law. Negotiations for securing diplomatic assurances are often conducted at a political level and are not transparent. In many countries, a person has no effective opportunity to challenge the reliability and adequacy of such assurances." Ibid., p. 6. "Diplomatic assurances—formal representations on the part of one government to another—are legally unenforceable though not always without political effect. When diplomatic assurances are made against torture or ill-treatment by states with a record of such abuse, they particularly lack credibility and effect. The damage is wrought not only by the state with the record of abuse. The state that solicits such dubious representations undermines the absolute prohibition against *refoulement* and gives tacit sanction to the other state's policies and practices of torture." Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, vol. 17, No. 4(D), April 2005, pp. 18-19. "Amnesty International, Human Rights Watch and the International Commission of Jurists consider that diplomatic assurances against torture and ill-treatment circumvent and are inconsistent with the absolute, non-derogable prohibitions of torture and other ill-treatment and forcibly returning a person to a place where he or she risks being subjected to torture or other ill-treatment. … [D]iplomatic assurances have proved to be an ineffective safeguard against torture and other ill-treatment, even when they contain a mechanism for post-return monitoring." Amnesty International, Human Rights Watch and International Commission of Jurists, *Reject rather than regulate*, 2 December 2005. (This document is available on the internet at http://hrw.org/backgrounder/eca/eu1205/).

> "States … must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."[1375]

587. The Human Rights Committee has expressed concern about the use of diplomatic assurances.

> "The Committee is concerned at cases of expulsion of asylum-seekers suspected of terrorism to their countries of origin. Despite guarantees that their human rights would be respected, those countries could pose risks to the personal safety and lives of the persons expelled, especially in the absence of sufficiently serious efforts to monitor the implementation of those guarantees (two visits by the embassy in three months, the first only some five weeks after the return and under the supervision of the detaining authorities) ... The State party should maintain its practice and tradition of observance of the principle of *non-refoulement*. When a State party expels a person to another State on the basis of assurances as to that person's treatment by the receiving State, it must institute credible mechanisms for ensuring compliance by the receiving State with these assurances from the moment of expulsion."[1376]

588. The former Special Rapporteur on torture, Theo van Boven, did not exclude the possibility of diplomatic assurances providing a means for complying with human rights concerns in expulsion cases. He indicated criteria for ensuring the sufficiency of these assurances while at the same time expressing concerns about the increasing use of such assurances.

> "Another practice that is increasingly undermining the principle of non-refoulement is the reliance on assurances, sought by the sending country from the receiving country, that transferred suspects will not be subjected to torture or cruel, inhuman or degrading treatment or punishment. The Special Rapporteur is not of the opinion that requesting and obtaining assurances as a precondition for the transfer of persons under terrorist or other charges should be ruled out altogether. In fact, in his report to the General Assembly at its fifty-seventh session he appealed to all States to ensure that, in all appropriate circumstances, before extraditing persons under terrorist or other charges, the receiving State has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other form of ill-treatment, and that a system to monitor the treatment of such persons has been put into place to ensure that they are treated with full respect for their human dignity (A/57/173, para. 35).
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> "However, since the Special Rapporteur submitted his report to the General Assembly two years ago, he has come across a number of instances where there were strong indications that diplomatic assurances were not respected and that transferred persons allegedly were

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[1375] Security Council resolution 1566 (2004), 8 October 2004, at para. 2.

[1376] Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Sweden, CCPR/C/74/SWE, April 24, 2002, para. 12.

> treated in violation of the absolute prohibition of torture and other forms of ill-treatment (see E/CN.4/2004/56/Add.l, para. 1827). The issue arises of whether the practice of resorting to assurances is not becoming a politically inspired substitute for the principle of non-refoulement which, it must not be forgotten, is absolute and non-derogable."[1377]

589. The present Special Rapporteur on torture, Manfred Nowak, has expressed concerns about the use of diplomatic assurances:

> "In the situation that there's a country where there's a systematic practice of torture, no such assurances would be possible, because that is absolutely prohibited by international law, so in any case the government would deny that torture is actually systematic in that country, and could easily actually give these diplomatic assurances, but the practice then shows that they are not complied with. And there's then no way or very, very little possibility of the sending country to actually - as soon as the person is in the other country - to make sure that this type of diplomatic assurances are complied with."[1378]

590. The independent expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman, has expressed concerns about diplomatic assurances and indicated that they should not be used to circumvent the *non-refoulement* obligation:

> "Also troubling is the increased reliance on diplomatic assurances sought by the sending State from the receiving State that transferred terrorist suspects will not face torture or other ill-treatment following their arrival. Such transfers are only sometimes accompanied by a rudimentary monitoring mechanism, most often in the form of sporadic visits to the person from the sending State's diplomatic representatives. Some States have argued that by securing such assurances they are complying with the principle of non-refoulement, but critics have taken issue with this assertion. Unlike assurances on the use of the death penalty or trial by a military court, which are readily verifiable, assurances against torture and other abuse require constant vigilance by competent and independent personnel. Moreover, the mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated. [...]
>
> "Given the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation, or other transfer, diplomatic assurances should not be used to circumvent that non-refoulement obligation."[1379]

[1377] Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note by the Secretary General, A/59/324, paras. 29-30.

[1378] BBC Radio 4, *Today Programme*, "What would it mean for terrorist suspects if the government did get its Prevention of Terrorism Bill through parliament?", 4 March 2005, at 8.30 at www.bbc.co.uk/radio4/today/ listenagain/zfriday_20050304.shtml (accessed 18 March 2005).

[1379] Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Note by the UN High Commissioner for Human Rights E/CN.4/2005/103, paras. 56 and 61.

591. In *Agiza v. Sweden*, the Committee against Torture concluded that the expulsion by Sweden of a suspected terrorist to his State of nationality (Egypt) violated article 3 of the Torture Convention notwithstanding the diplomatic assurances obtained by Sweden from Egypt.

> "13.2 The issue before the Committee is whether removal of the complainant to Egypt violated the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected by the Egyptian authorities to torture. The Committee observes that this issue must be decided in the light of the information that was known, or ought to have been known, to the State party's authorities *at the time* of the removal. Subsequent events are relevant to the assessment of the State party's knowledge, actual or constructive, at the time of removal.
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> "13.4 The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons. The State party was also aware that its own security intelligence services regarded the complainant as implicated in terrorist activities and a threat to its national security, and for these reasons its ordinary tribunals referred the case to the Government for a decision at the highest executive level, from which no appeal was possible. The State party was also aware of the interest in the complainant by the intelligence services of two other States: according to the facts submitted by the State party to the Committee, the first foreign State offered through its intelligence service an aircraft to transport the complainant to the second State, Egypt, where to the State party's knowledge, he had been sentenced in absentia and was wanted for alleged involvement in terrorist activities. In the Committee's view, the natural conclusion from these combined elements, that is, that the complainant was at a real risk of torture in Egypt in the event of expulsion, was confirmed when, immediately preceding expulsion, the complainant was subjected on the State party's territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party's police. It follows that the State party's expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk."[1380]

592. In a separate opinion, Mr. Alexander Yakovlev expressed the view that the expulsion did not violation article 3 of the Torture Convention because of the diplomatic assurances obtained in good faith by the expelling State.

> "It is clear that the State party was aware of its obligations under article 3 of the Convention, including the prohibition on refoulement. Precisely as a result, it sought assurances from the Egyptian government, at a senior level, as to the complainant's proper

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[1380] *Agiza v. Sweden*, Communication No. 233/2003, 24 May 2005, paras. 13.3 and 13.4 (citation omitted).

> treatment. No less an authority than the former Special Rapporteur of the Commission on Human Rights on Torture, Mr. van Boven, accepted in his 2002 report to the Commission on Human Rights the use of such assurances in certain circumstances, urging States to procure 'an unequivocal guarantee … that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return' . This, which is precisely what the State party did, is now faulted by the Committee. At the time, the State party was entitled to accept the assurances provided, and indeed since has invested considerable effort in following-up the situation in Egypt. Whatever the situation may be if the situation were to repeat itself today is a question that need not presently be answered. It is abundantly clear however at the time that the State party expelled the complainant, it acted in good faith and consistent with the requirements of article 3 of the Convention. I would thus come to the conclusion, in the instant case, that the complainant's expulsion did not constitute a violation of article 3 of the Convention."[1381]

593. Similarly, the Council of Europe Commissioner for Human Rights Alvaro Gil-Robles has expressed concern about the risks of relying on diplomatic assurances:

> "The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains ... When assessing the reliability of diplomatic assurances, an essential criteria must be that the receiving state does not practice or condone torture or ill-treatment, and that it exercises effective control over the acts of non-state agents. In all other circumstances it is highly questionable whether assurances can be regarded as providing indisputable safeguards against torture and ill-treatment."[1382]

594. The value of diplomatic assurances of respect for human rights has been challenged in a number of national courts.[1383] In particular, in the case of *Suresh v. Canada*, the Supreme Court of Canada stated:

[1381] *Agiza v. Sweden*, Communication No. 233/2003, 24 May 2005, Separate Opinion of Committee Member Mr. Alexander Yakovlev (dissenting, in part), para. 2.

[1382] Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, April 21-23, 2004. Council of Europe, CommDH(2004)13, July 8, 2004, at para. 19.

[1383] *Suresh v. Canada*, note 471 above; *Youssef v. The Home Office*, High Court of Justice, Queen's Bench Division, Case No: HQ03X03052 [2004] EWHC 1884 (QB), 30 July 2004 ("It ought therefore to have been readily apparent that even if a single non-torture assurances was actually given, there were going to be very serious difficulties in persuading an English court that such an assurance was sufficient."); *In the Matter of Ashraf al-Jailani*, Executive Office for Immigration Review (EOIR), U.S. Immigration Court, York, Pennsylvania, File #A 73 369 984, 17 December 2004 (Per Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, vol. 17, No. 4(D), April 2005, pp. 44); *Mahjoub v. Canada (Minister*

"123. Not only must the refugee be informed of the case to be met, the refugee must also be given an opportunity to challenge the information of the Minister where issues as to its validity arise. Thus the refugee should be permitted to present evidence pursuant to s. 19 of the Act showing that his or her continued presence in Canada will not be detrimental to Canada, notwithstanding evidence of association with a terrorist organization; The same applies to the risk of torture on return. Where the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances.

"124. It may be useful to comment further on assurances. A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.

"125. In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfil the assurances, particularly where there is doubt about the government's ability to control its security forces. In addition, it must be remembered that before becoming a Convention refugee, the individual involved must establish a well-founded fear of persecution (although not necessarily torture) if deported."[1384]

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of Citizenship and Immigration) [2005] F.C.J. No. 173, 31 January 2005; *Advies inzake N. Kesbir,* Hoge Raad der Nederlanden, Court of Appeal of the Netherlands, EXU 2002/518, 02853/02/U-IT, 7 May 2004 (Per Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture,* vol. 17, No. 4(D), April 2005, pp. 72); *De Staat der Nederlanden (Ministerie van Justitie) tegen N. Kesbir,* Court of Appeal of the Netherlands, Het Gerechtshof's Gravenhage, LJN, AS3366, 04/1595 KG, 20 January 2005 (Per Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture,* vol. 17, No. 4(D), April 2005, p. 75); *Minister of Justice for Canada v. Rodolfo Pacificador (Canada v. Pacificador),* Court of Appeal for Ontario, No. C32995, August 1, 2002 ("In my view, when one looks at the record as a whole, the failure of the Philippines to provide acceptable explanations of what has gone on in the past or to provide adequate assurances about what might happen in the future, seriously undermines this fundamental element of the Minister's decision.") (relating to extradition); and *The Government of the Russian Federation v. Akhmed Zakaev,* Bow Street Magistrates' Court, Decision of Hon. T. Workman, November 13, 2003 (Per Human Rights Watch, *Empty Promises: Diplomatic Assurances no Safeguard against Torture,* vol. 16, No. 4(D), April 2004, at p. 29).

[1384] *Suresh v. Canada,* note 471 above, paras. 123-125.

4. Expulsion to a State which has no duty to admit

595. There are different views as to whether a State incurs responsibility for an internationally wrongful act by expelling an alien to a State which is under no duty and has not otherwise agreed to receive the alien. The view has been expressed that the broad discretion of the expelling State to determine the destination of the expelled person is not inconsistent with the right of the receiving State to refuse to admit this person in the absence of any duty to do so.[1385] Therefore, it is further suggested that the expelling State does not violate international law by expelling an alien to a State which does not have a duty to receive this person since the receiving State can still exercise its right to refuse to admit the alien.[1386] Conversely, the view has been expressed that such conduct by the expelling States is inconsistent with the general rule that a State has no duty to admit aliens into its territory.[1387]

[1385] "The breadth of discretion conferred upon the national authorities is in no way inconsistent with the general principle that an alien cannot be deported to a State other than that of his nationality against the will of such State. Indeed, it happens not infrequently that national authorities, acting in accordance with a power undoubtedly expressed in national law, expel an alien to a third State where the national authorities exercise a power, equally undoubted under domestic law, to remit him whence he came." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 468.

[1386] "The act of sending an alien to a country which is unwilling and under no obligation to admit him does not in normal circumstances engage international responsibility, either towards the State to which he is conducted or towards any State having an interest (by treaty or otherwise) in the maintenance of the alien's fundamental rights. Circumstances may arise, however, in which the repeated expulsion of an alien to States unwilling to accept him may entail a breach of the specific obligations undertaken by the expelling State in a Convention designed to protect human rights. Moreover, the expulsion of an alien will entail a breach of the Geneva Convention on the Legal Status of Refugees if he is a refugee and is returned in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, nationality, membership of a particular social group or political opinion." Ibid., pp. 468-469 (citations omitted).

[1387] "This question of country is of direct relevance to the question of the manner in which the right of expulsion is exercised. A State may not just conduct an alien to its frontier and push him over without engaging itself in responsibility to the State to which he is thus forcibly expelled. It may, therefore, only deport him to a country willing to receive him, or to his national country." D. P. O'Connell, *International Law*, vol. 2, 2nd ed., London, Stevens & Sons, 1970, p. 710 (citation omitted). "From the proposition that a State is in general under no obligation to admit aliens to its territory, it follows that a State may not in principle expel him other than to his country of nationality, unless the State of destination agrees to accept him." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 468.

VIII. PROCEDURAL REQUIREMENTS

596. The expulsion of an alien must comply with the necessary procedural requirements.[1388] As discussed previously, the general standard for the treatment of aliens[1389] as well as the requirements for the lawful expulsion of aliens have evolved over the centuries. The procedural requirements for the lawful expulsion of aliens were initially recognized in international jurisprudence[1390] and State practice in relation to general limitations such as the prohibition of arbitrariness or abuse of power.[1391]

597. Depending on the circumstances, the consequences of expulsion proceedings may be considered to be of similar severity to those of criminal proceedings. However, expulsion proceedings are generally not characterized as criminal proceedings. The procedural guarantees in expulsion proceedings are therefore not as extensive as those for criminal proceedings.[1392] Thus, for example,

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[1388] "However, the right to expel or deport, like the right to refuse admission, must be exercised in conformity with generally accepted principles of international law, especially international human rights law, both substantive and procedural, and the applicable international agreements, global, regional and bilateral. Consequently, in exercising the right to expel or deport, a State must observe the requirements of due process of law, international and domestic ('in accordance with its laws and regulations'); its officials must not act arbitrarily or abuse the powers granted to them by their national law, and in all instances they must act reasonably and in good faith." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 89. "On the other hand, while a state has a broad discretion in exercising its right to expel aliens, its discretion is not absolute. Thus, by customary international law… it must act reasonably in the manner in which it effects an expulsion." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 940. "Where the procedure of expulsion itself constitutes an encroachment upon human rights, the expulsion itself, even if reasonably justified, must be characterized as contrary to international law." Rainer Arnold, "Aliens", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 102-107. at p. 104. "An expulsion which is founded on just cause may nevertheless be tainted by the manner in which it is carried out." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 263.

[1389] *See* Part VI.A.4.

[1390] "As we shall see, recent claims and awards confirm the existence of limitations of both substance and form on the State's power of expulsion." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 459. "International cases arise less frequently because of a dispute as to the expediency of or necessity for expulsion, states having a wide discretion in these matters, than because of a harsh, arbitrary, or unnecessarily injurious exercise of the right." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1915, pp. 55-56 (citing Casanova (U. S.) *v.* Spain, Feb. 12, 1871, Moore's Arb. 3353). "Expulsion is, in theory at least, not a punishment… Expulsion must therefore be effected with as much forbearance and indulgence as the circumstances and conditions of the case allow and demand… The home state of the expelled alien, by its right of protection over its citizens abroad, may well insist upon such forbearance and indulgence." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 945.

[1391] *See* Part VI.A.1 and 3.

[1392] "Moreover, the procedural protections under Article 13, although important, are far more modest than those that apply under ICCPR Article 14 to criminal trials. Article 13 requires only a procedure established by law and the prohibition of the retroactive application of criminal laws would not apply with respect to immigration laws concerning expulsion.[1393] The view has been expressed that States retain a wide margin of discretion with respect to the procedural guarantees in expulsion proceedings.[1394] The wisdom or fairness of this approach has been subject to criticism.[1395]

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some opportunity to 'submit the reasons against expulsion,' with a modest requirement for review by and representation before the competent authority." David A. Martin, "The Authority and Responsibility of States" in Alexander T. Aleinikoff and V. Chetail (eds.), Migration and International Legal Norms, The Hague, T.M.C. Asser Press, 2003, pp. 31-45, at p. 39. "Expulsion of an alien is not a punishment, but an executive act comprising an order directing the alien to leave the state. The judiciary may sometimes have power to interfere in the case of an abuse of discretion by the executive, but an alien is not always given the right to challenge the decision of the executive before the judiciary." Shigeru Oda, "Legal Status of Aliens", *in Max* Sørensen (dir.) *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, at pp. 482-483. "In an early decision, the Supreme Court held that the Government was not competent under statute to take into custody an alleged illegal entrant and to deport him without first giving him an opportunity to be heard. Such hearing did not need to be in accordance with judicial proceedings, but should be that which was appropriate to the circumstances. The full benefits of due process have been denied as a result of the nature which the courts have attributed to deportation proceedings. While admitting the severity of the measure, the tendency has been to describe them as civil and not criminal proceedings. Deportation is not, therefore, punishment, and removal on account of conviction for crime cannot come within the prohibition on cruel and unusual punishment in the Eighth Amendment. Yet at the same time there has been judicial recognition of deportation as a drastic penalty, such that the relevant statutes are to be strictly construed." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 238-239 (citing *Yick Wo* v. *Hopkins* 118 U.S. 356 (1886); *Kaoru Yamataya* v. *Fisher* 189 U.S. 86 (1903) (The Japanese Immigrant Case); *Ludeck* v. *Watkins* 335 U.S. 160 (1948) as well as *Netz* v. *Ede* [1946] Ch. 224; *R.* v. *Bottrill, ex parte Küchenmeister [194.7] 1* K.B. 41) (other citations omitted).

[1393] "Expulsion is, in theory at least, not a punishment ... A consideration which permits the retroactive application of laws, which would be forbidden if the matter were otherwise ..." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 945 and n. 2 (citing *Artukovicv Immigration and Naturalization Service* (1982), ILR, 79, pp. 378, 381) (other citations omitted). "But it seems that deportation statutes cannot be unconstitutional by reason *of ex post facto* provisions. In the leading case of *Harisiades* v. *Shaughnessy* the Supreme Court held that the United States had the power to expel an alien notwithstanding his long residence, that the exercise of this power violated neither due process nor freedom of speech, and that deportation because of membership of a 'subversive organization' prior to the effective date of the statute did not constitute an *ex post facto* law within the constitutional prohibition. In addition, the alien who is subject to the 'civil' procedure of deportation cannot rely upon the otherwise far-reaching implications of the Supreme Court decision in the *Miranda Case.* In criminal prosecutions this decision precludes the use of statements made by a person in custody unless he is first told of his right to remain silent and of his right to have a lawyer present at his interrogation." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, at p. 239 (citing *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952); *Mandel* v. *Mitchell*, 325 F. Supp. 620 (1971); reversed, *sub nom; Kleindienst* v. *Mitchel,l* 408 U.S. 753 (1972); *Miranda* v. *Arizona* 384 U.S. 436 (1966); *Pang* v. *INS* 368 F.2d 637 (1966); *Lavoie* v. *INS*, 418 F.2d 732 (1969), *cert. den.* 400 U.S. 854 (1970); *Valeros* v. *INS*, 387 F.2d 921 (1967); and *Kung* v. *District Director*, 356 F. Supp. 571 (1973).

[1394] "International human rights law does impose procedural requirements on expulsion decisions, but the careful limits placed on these obligations reveal the wide margin of discretion states retain even in this realm." David A. Martin, "The Authority and Responsibility of States" *in* T. Alexander Aleinikoff and V. Chetail (eds.), Migration and International Legal Norms, The Hague, T.M.C. Asser Press, 2003, pp. 31-45, at p. 39.

[1395] "In the view of the present writer, it is both undesirable and unnecessary to adopt the habit of certain municipal courts, which is to characterize deportation as 'not punishment', and from that characterization to

598. The procedural requirements for the expulsion of aliens were considered in a study on the expulsion of immigrants prepared by the Secretariat over 50 years ago. Although there have been significant developments in international law as well as national law in the intervening years, many of the issues raised are still relevant today.

> "Procedure in matters of expulsion has developed in various countries under the impact of the principle that expulsion does not constitute a punishment, but a police measure taken by the government in the interest of the State. This implies that in expulsion proceedings the alien is not to be accorded those safeguards which are normally provided in a judicial process, e.g., proper notification regarding charges, guarantees against unreasonable search and seizure, compulsory attendance and examination of witnesses, right to counsel, right of appeal, statute of limitations, application of amnesty, etc. Since expulsion is thus considered as a more or less routine administrative process, the legislative provisions on expulsion in many countries do not contain rules for the procedure to be followed in the issuance of expulsion orders and/or their implementation; or these provisions are restricted to very general indications which aim rather at keeping the machinery of expulsion functioning properly than at affording protection to the persons concerned.
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> "The approach described above has been frequently opposed, and objections have been raised against the administration's having unlimited discretionary power to evaluate grounds for expulsion and to establish the procedure without any check. It has been stated that 'deportation is a punishment. It involves first an arrest, a deprival of liberty; and second: a removal from home, from family, from business, from property ... Everyone knows that to be forcibly taken away from home, and family, and friends and business, is punishment…' It is even 'a penalty more severe than the loss of freedom by imprisonment for a period of years'. Accordingly, together with the proposal to restrict by international law the discretionary power of States to expel aliens, and with the definition in various national laws of cases in which expulsion is admissible, suggestions have been put forward for a close association of judicial

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deduce certain consequences, such as the absence of a right of appeal. See, for example, *Muller* v. *Superintendent, Presidency Jail, Calcutta,* [1955] I.L.R. 497 (Supreme Court of India); *Bugajewitz* v. *Adams* 228 U.S. 589 (1913), per Holmes J., at p. 591: 'nor is the deportation a punishment; it is simply a refusal by the government to harbour persons whom it does not want'. In *Lavoie* v. *INS* 418 F.2d 732 (1969) the court held that deportation proceedings were civil and not criminal; the VIth Amendment guarantees declared and affirmed in *Miranda* v. *Arizona* 384 U.S. 436 (1966) did not, therefore, apply; but cf. *Woodby* v. *INS* 385 U.S. 276 (1966), at p. 285; *Gastelum-Quinones* v. *Kennedy* 374 U.S. 469 (1963), at p. 479. More recently, in *Santelises* v. *INS* 491 F.2d 1254 (1974), the civil nature of the proceedings was held to mean that deportation could not amount to 'cruel and unusual punishment' contrary to the VIIIth and XIVth Amendments; compare the view of the Supreme Court on capital punishment *(Furman* v. *Georgia* 92 S.Ct. 2726 (1972), esp. per Brennan J. at pp. 2742-2748), and on expatriation *(Trop* v. *Dulles* 356 U.S. 86 (1958), at p. 102). With reference to the law of the Federal Republic of Germany, Schiedermair has observed: 'die Ausweisung ist im übrigen eine Verwaltungsmassnahme und keine Strafe' ["Expulsion is generally an administrative measure and not a penalty."] and therefore the principle *ne bis in idem* does not apply where expulsion is ordered after conviction and punishment. A similar conclusion was reached in *U.S.* v. *Ramirez-Aguilar* 455 F.2d 486 (1972)." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 257-258, n. 3.

> authorities with expulsion proceedings and for according to the persons involved all the guarantees which are provided to those on trial for criminal offences. It has been maintained that conferring the responsibility in this field on such authorities would contribute to ensuring that individual consideration would be given to each case and that thereby the danger of disregarding the legitimate interests of the human beings involved would be removed. This would be particularly justified in cases where the alleged behaviour for which expulsion is envisaged constitutes a statutory penal offence and where the decision as to whether such reason exists in the particular case should be given by a court rather than left to the discretion of an administrative organ.
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> "As a result of these suggestions, statutory procedural rules have been adopted in some countries; these contain provisions protecting persons under the threat of expulsion, by checking the arbitrary character of administrative decisions, ensuring that the merits of the case are considered by judicial or semi-judicial authorities either before the expulsion order is made or by way of appeal, etc. This development, however, is far from being complete, the respective provisions having failed in many respects to provide the person under the threat of expulsion with protection which would be similar to, if not identical with that provided for a criminal in court. This development is also far from being universal, since in many countries enforcement and judicial functions are combined within one agency, and the right of the administration to decide upon expulsion still remains absolute. Moreover, it is important to note that in many cases the departure from a country of immigrants whom the administration considers undesirable is enforced without the regular expulsion procedure being applied." [1396]

599. During the twentieth century, the development of international human rights law led to more specific procedural requirements for the lawful expulsion of aliens. The fundamental procedural requirements for the expulsion of aliens have been addressed in treaty law and international jurisprudence. More specific procedural requirements are generally to be found in national legislation. The national laws of States often reflect international human rights standards.[1397] The national laws of

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[1396] United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955, pp. 1-77, at pp. 29-31, paras. 45-48 (ST/SOA.22 and Corr.2 (replaces Corr.1)) (quoting, respectively, Mr. Justice Brewer, in the case *Fong Yue Ting v. United States* (U.S.698/1893/), dissenting opinion; and Mr. Justice Rutledge, in the case *Knauer v. United States* (14 U.S. Law Week 4450/1946), dissenting opinion (other citations and cross-references omitted).

[1397] "In many countries, the power of expulsion or deportation is regulated by statute which specifies the grounds on which it may be exercised and the procedural safeguards that should be followed. These statutes usually apply the generally accepted principles of international human rights. Thus it is usually provided: that no person be expelled or reported from the territory of a State except on reasonable grounds and pursuant to a written order conforming to law; that the order be communicated to the person sought to be expelled or deported along with the grounds on which it is based; and that the alien be afforded a reasonable opportunity to challenge the legality or the validity of the order in appropriate proceedings before a court of law. The requirement that an order of deportation or expulsion should be in writing and in accordance with the law of the State is designed to safeguard against an arbitrary exercise of power. [See Governing Rule 4.]" Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 91 (paragraph indentation omitted).

some States provide in expulsion proceedings even greater procedural safeguards which are similar to those applicable in criminal proceedings.[1398]

600. It may be possible to glean general principles from the divergent national laws with respect to the necessary procedural guarantees for expulsion proceedings. It may also be useful to consider the extent to which the procedural guarantees contained in international instruments with respect to criminal proceedings may be applicable mutatis mutandis in order to ensure due process in expulsion proceedings.

A. Nature of proceedings

601. National laws considerably differ as to the nature of the proceedings which may lead to the expulsion of an alien. In some States, expulsion may even be the result of different proceedings depending on the nature of the expulsion concerned (e.g., political, criminal or administrative).[1399] A State may reserve to an executive authority the right to decide an expulsion or its revocation,[1400] or otherwise establish instances in which an administrative rather than judicial decision is sufficient to expel the alien.[1401] A State may expressly permit an authority below the national level to order an expulsion.[1402] A State may specify instances in which a court judgment or order is necessary or

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[1398] "Immigration proceedings must comply with general principles of due process. The ICCPR devotes a specific article, Article 13, to expulsion proceedings … [T]he procedural rights guaranteed under the ICCPR are less stringent than those guaranteed in criminal proceedings. It should be noted, however, that many states go significantly beyond the protections identified in Article 13, such as entitling aliens in expulsion proceedings access to a court independent of the initial decision-maker, the right to be represented by counsel, and the right to present evidence and examine evidence used against him." Alexander T. Aleinikoff, note 119 above, p. 19. "And most developed nations in fact apply procedures that go far beyond these minimums." David A. Martin, "The Authority and Responsibility of States" *in* T. Alexander Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, pp. 31-45, at p. 39.

[1399] For example, the Swiss legal order establishes three different procedures for the expulsion of an alien, which correspond to three different kinds of expulsion: (1) political expulsion (Switzerland, Federal Constitution, article 121, para. 2); (2) administrative expulsion (Switzerland, 1931 Federal Law, articles 10 and 11); and (3) penal, judicial expulsion (Switzerland, Penal Code, article 55, and Switzerland, Military Penal Code, article 40).

[1400] Bosnia and Herzegovina, 2003 Law, article 28(1)-(2); Brazil, 1980 Law, article 65; France, Code, article L522-2; Madagascar, 1994 Decree, article 37, 1962 Law, articles 14, 16; Panama, 1960 Decree-Law, articles 85-86; and Portugal, 1998 Decree-Law, article 119.

[1401] Bosnia and Herzegovina, 2003 Law, articles 21(1), 28(1); Nigeria, 1963 Act, article 25; Paraguay, 1996 Law, article 84; Portugal, 1998 Decree-Law, article 109; Spain, 2000 Law, article 23(3)(b)-(c); Sweden, 1989 Act, sections 4.4-5; and United States, INA, sections 235(c)(1), 238(a)(1), (c)(2)(C)(4), 240.

[1402] China, 2003 Provisions, article 187.

sufficient for an expulsion to occur.[1403] Expulsion matters may be given judicial priority over other cases.[1404]

602. A State may commence expulsion proceedings upon the finding or involvement of an official,[1405] or upon the introduction of an international arrest warrant,[1406] a final and binding court decision,[1407] or relevant operational information available to State authorities.[1408] The relevant legislation may specify the form, content or manner of an application or other formal submission made with respect to the alien's potential expulsion.[1409] A State may expressly provide for the cancellation of a visa or other permit upon the alien's expulsion.[1410]

603. A summary or special expulsion procedure may be applied when the alien manifestly has no chance of obtaining entry authorization,[1411] or when grounds for expulsion may exist with respect to illegal entry,[1412] certain breaches of admission conditions,[1413] certain criminal acts or related grounds,[1414]

[1403] Bosnia and Herzegovina, 2003 Law, articles 27(2), 47(2); Canada, 2001 Act, article 77(1); China, 2003 Provisions, article 183; Italy, 1998 Decree-Law No. 286, article 16(6); Nigeria, 1963 Act, articles 19(1), 44, 48(1); Paraguay, 1996 Law, articles 38, 84; Portugal, 1998 Decree-Law, articles 102, 109, 126(1); Spain, 2000 Law, articles 23(3)(a), 57(7); Sweden, 1989 Act, sections 4.8-9; and United States, INA, section 238(c)(1), (2)(C)(4), 279, 502, 503(c).

[1404] Nigeria, 1963 Act, article 43(1).

[1405] Australia, 1958 Act, article 203(2), (4)-(7); Nigeria, 1963 Act, article 19(3); and Republic of Korea, 1992 Act, articles 58, 67.

[1406] Bosnia and Herzegovina, 2003 Law, articles 27(2), 47(2).

[1407] Ibid.

[1408] Ibid.

[1409] Belarus, 1999 Council Decision, article 3, 1998 Law, article 15; Brazil, 1981 Decree, article 101; Cameroon, 2000 Decree, article 62(1); Canada, 2001 Act, articles 44(1), 77(1); Japan, 1951 Order, articles 62, 65; Portugal, 1998 Decree-Law, article 111(2); and United States, INA, sections 238(c)(2)(A)-(B), 503(a)(1)-(2).

[1410] Belarus, 1999 Council Decision, article 5, 1998 Law, article 15; Brazil, 1981 Decree, article 85(II), 1980 Law, article 48(II); Paraguay, 1996 Law, article 39; and Spain, 2000 Law, article 57(4).

[1411] Switzerland, 1949 Regulation, article 17(1).

[1412] Belarus, 1999 Council Decision, article 3; and Nigeria, 1963 Act, article 25(1)-(2). If an international agreement does not establish a special handing-over procedure between the relevant States, the alien may be turned over to the expelling State's internal authorities for expulsion (Belarus, 1999 Council Decision, article 3).

[1413] Brazil, 1981 Decree, article 104, 1980 Law, article 70; Italy, 1998 Decree-Law No. 286, articles 13(4)-(5), (*5bis*)-(*5ter*), 15; and Sweden, 1989 Act, section 4.6.

[1414] Canada, 2001 Act, articles 77-81; Chile, 1975 Decree, article 87; Columbia, 1995 Decree, article 89(1), (7); France, Code, article L532-1; Italy, 1998 Decree-Law No. 286, articles 13(3), (*3bis*)-(*3quater*), 16(6), 1996 Decree-Law, article 7(3); Japan, 1951 Order, articles 63-65; Portugal, 1998 Decree-Law, article 115; Spain, 2000 Law, article 57(7); Sweden, 1989 Act, sections 4.8-9; and United States, INA, section 238.

the State's *ordre public*,[1415] national security,[1416] national interests,[1417] certain economic grounds,[1418] certain moral grounds,[1419] or certain violations of international law.[1420] A special procedure may also apply when the alien is not a national of a State having a special arrangement or relationship with the expelling State.[1421]

B. Procedural guarantees

1. Principle of non-discrimination

604. The principle of non-discrimination appears to be relevant not only in relation to the adoption of the decision as to whether to expel an alien or not (see Parts VII.A.7 and VII.B.6), but also with regard to the procedural guarantees to be respected. Commenting on article 13 of the International Covenant on Civil and Political Rights, which sets forth procedural guarantees in relation to the expulsion of aliens, the Human Rights Committee stressed that:

> "Discrimination may not be made between different categories of aliens in the application of article 13".[1422]

605. The Committee on the Elimination of Racial Discrimination has expressed its concern about cases of racial discrimination in relation to the expulsion of aliens, including with respect to procedural guarantees.[1423] In its general recommendation XXX, the Committee recommended that States parties to the International Convention on the Elimination of All Forms of Racial

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[1415] Brazil, 1981 Decree, article 104, 1980 Law, article 70; Columbia, 1995 Decree, article 89(2)-(3); and Italy, 1996 Decree-Law, article 7(2).

[1416] Brazil, 1981 Decree article 104, 1980 Law, article 70; Canada, 2001 Act, articles 77-81; Colombia, 1995 Decree, article 89(2)-(3); and United States, INA, sections 235(c), 502-04.

[1417] Iran, 1931 Act, article 12.

[1418] Brazil, 1981 Decree, article 104, 1980 Law, article 70.

[1419] Ibid.

[1420] Canada, 2001 Act, articles 77-78.

[1421] France, Code, article L531-3.

[1422] Human Rights Committee, General Comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, para. 10.

[1423] *See*, in particular, Concluding observations of the Committee on the Elimination of Racial Discrimination: France, 1 March 1994, A/49/18, para. 144 "Concern is expressed that the implementation of these laws [*i.e.* laws of immigration and asylum] could have racially discriminatory consequences, particularly in connection with the imposition of limitations on the right of appeal against expulsion orders and the preventive detention of foreigners at points of entry for excessively long periods."

Discrimination not discriminate on the basis of race, colour, ethnic or national origin in expelling aliens and in allowing them to pursue effective remedies in case of expulsion:

> "[The Committee] recommends […] that the States parties to the Convention, as appropriate to their specific circumstances, adopt the following measures:
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> […]
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> "Ensure … that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies".[1424]

606. The Human Rights Committee stressed the prohibition of gender discrimination with respect to the right of an alien to submit arguments against his or her expulsion:

> "States parties should ensure that alien women are accorded on an equal basis the right to submit arguments against their expulsion and to have their case reviewed, as provided in article 13. In this regard, they should be entitled to submit arguments based on gender-specific violations of the Covenant such as those mentioned in paragraphs 10 and 11 above."[1425]

2. Right to receive notice of expulsion proceedings

607. The requirement that an alien subject to an expulsion procedure be given timely notice with respect to the commencement and/or the status of such a procedure appears in the legislation of some States. A State may provide notice to the alien concerning potential, intended or commenced expulsion proceedings,[1426] proceedings which may affect the alien's protected status,[1427] or the alien's placement on a list of prohibited persons.[1428] A State may require that the notice provide (1) information

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[1424] Committee on the Elimination of Racial Discrimination, note 1164 above, para. 25.

[1425] Human Rights Committee, General Comment No. 28: Concerning Article 3, Equality of Rights between Men and Women, 29 March 2000, para. 17. Among the gender-specific violations referred to in paragraphs 10 and 11 are: female infanticide, the burning of widows and dowry killings, domestic and other types of violence against women, including rape, forced abortion and sterilization and genital mutilations.

[1426] Australia, 1958 Act, article 203(2); Belarus, 1999 Council Decision, article 17, 1998 Law, article 29; Bosnia and Herzegovina, 2003 Law, article 8(2); Canada, 2001 Act, articles 170(c), 173(b); Chile, 1975 Decree, article 90; Czech Republic, 1999 Act, section 124(1)-(2); France, Code, articles L213-2, L512-2, L522-1(1), L522-2, L531-1; Hungary, 2001 Act, article 42(1); Iran, 1931 Act, article 11, 1973 Regulation, article 16; Italy, 1998 Decree-Law No. 286, articles 13(5), (7), 16(6), 1998 Law No. 40, article 11(7), 1996 Decree-Law, article 7(3); Japan, 1951 Order, articles 47(3)-(4), 48(1), (3); Madagascar, 1994 Decree, article 35, 1962 Law, article 15; Malaysia, 1959-1963 Act, article 9(3); Nigeria, 1963 Act, article 7(1); Panama, 1960 Decree-Law, articles 58, 85-86; Paraguay, 1996 Law, article 35(a); Portugal, 1998 Decree-Law, articles 22(2), 120(1)-(2); Republic of Korea, 1992 Act, articles 59(3), 60(5), 89(3); Spain, 2000 Law, articles 26(2), 57(9); United Kingdom, 1971 Act, section 6(2); and United States, INA, sections 238(b)(4)(A), (D), (c)(2)(A), (3)(B)(5), 239(a), 240(b)(5)(A)-(D), (c)(5), 504(b)(1)-(2).

[1427] Canada, 2001 Act, article 170(c).

[1428] Portugal, 1998 Decree-Law, articles 114(2), 120(2).

on potential or upcoming procedures, and the alien's rights or options in their respect;[1429] or (2) findings or reasons behind preliminary decisions.[1430] A State may also specify a location[1431] or manner[1432] in which notice is to be given.

3. Detention during the proceedings

608. An alien may be detained during the expulsion proceedings. The detention of an alien in such a situation would be subject to international human rights standards contained in treaties.[1433] Attention

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[1429] Belarus, 1999 Council Decision, article 17, 1998 Law, article 29; Bosnia and Herzegovina, 2003 Law, article 8(2); Italy, 1998 Decree-Law No. 286, articles 13(5), (7), 16(6), 1998 Law No. 40, article 11(7), 1996 Decree-Law, article 7(3); Japan, 1951 Order, articles 47(4), 48(3); Panama, 1960 Decree-Law, article 58; Paraguay, 1996 Law, article 35(a); Portugal, 1998 Decree-Law, articles 22(2), 120(2); Republic of Korea, 1992 Act, articles 59(3), 89(3); South Africa, 2002 Act, article 8(1); Spain, 2000 Law, articles 26(2), 57(9); and United States, INA, sections 238(b)(4)(A), (c)(2)(A), (3)(B)(5), 239(a), 240(b)(5)(A)-(D), (c)(5), 504(b)(1)-(2).

[1430] Belarus, 1999 Council Decision, article 17; Czech Republic, 1999 Act, section 124(2); France, Code, articles L222-3, L522-2, L531-1; Japan, 1951 Order, article 47(3); Portugal, 1998 Decree-Law, article 22(2); Republic of Korea, 1992 Act, article 89(3); Spain, 2000 Law, article 26(2); and United States, INA, section 504(b)(1).

[1431] Guatemala, 1986 Decree-Law, article 129.

[1432] Bosnia and Herzegovina, 2003 Law, article 75(5); France, Code, article L512-3; Nigeria, 1963 Act, article 7(1)-(5); Panama, 1960 Decree-Law, articles 85-86; Republic of Korea, 1992 Act, article 91(1)-(3); and United States, INA, section 239(c), 240(b)(5)(A)-(B). The relevant legislation may require that delivery be made in person when the notice concerns the decision made on the alien's claim of protected status (Bosnia and Herzegovina, 2003 Law, article 75(5); and Canada, 2001 Act, article 169(d)).

[1433] See, in particular, article 9 of the International Covenant on Civil and Political Rights: ("1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."; article 10 of the same Covenant: "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."); article 5 of the European Convention on Human Rights ("1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by may also be drawn to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, annexed to General Assembly resolution 43/173. Of particular relevance to the detention pending expulsion proceedings is article 8 of the said principles, according to which:

609. "Persons in detention [*i.e.* persons "deprived of personal liberty except as a result of conviction for an offense"; cf. Use of Terms, (b)] shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons."[1434]

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law: a) the lawful detention of a person after conviction by a competent court; b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. 3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."); and article 7 of the American Convention on Human Rights ("1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment. 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial. 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies. 7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfilment of duties of support.)" "The detention of immigrants in the course of immigration proceedings is also subject to human rights norms that prohibit 'arbitrary arrest or detention.' Thus, the ICCPR provides that '[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if detention is not lawful.' Detention and migrant interdiction policies may impose particular burdens on asylum-seekers, undercutting their rights to seek asylum and to be protected against *non-refoulement*." Alexander T. Aleinikoff, note 119 above, p. 20 (quoting article 9, para. 4 of the Covenant).

[1434] *See* General Assembly resolution 43/173, 9 December 1988, annex, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 8.

610. The detention of an alien during the expulsion proceedings is permitted by several national laws. The relevant legislation may permit the alien's detention and establish the alien's rights during such detention.[1435] A detention may be coupled with an investigation relating to the alien's potential expulsion.[1436] A State may prohibit or restrict the detention of minors,[1437] expectant mothers,[1438] protected persons,[1439] the aged,[1440] or the disabled.[1441] A State may in like respect establish provisions exclusively applicable to permanent residents.[1442] The relevant legislation may permit a residence assignment, residential surveillance, or another form of surveillance or supervision to be undertaken instead of the alien's detention.[1443]

611. A State may permit detention to precede formal notice being made to the alien,[1444] require notice to precede detention,[1445] or permit both to occur simultaneously.[1446] The relevant legislation

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[1435] Argentina, 2004 Act, article 70; Australia, 1958 Act, articles 5, 177-80, 182, 189-90, 192, 196-97, 250, 252, 252A, 252AA, 252B-G; Austria, 2005 Act, article 3.76(1); Belarus, 1999 Council Decision, articles 8-9; Brazil, 1980 Law, article 68; Canada, 2001 Act, articles 54-60, 57(3), 82-85; Chile, 1975 Decree, article 89; China, 1986 Law, article 27, 2003 Provisions, article 183; Columbia, 1995 Decree, article 93; Czech Republic, 1999 Act, sections 124-51; France, Code, articles L221-1, L221-2, L221-3, L221-4, L222-1, L222-2, L222-3, L224-1, L224-2, L224-3, L224-4, L551-2; Germany, 2004 Act, article 62(1); Greece, 2001 Law, article 44(3), (5); Hungary, 2001 Act, article 48; Italy, 1998 Decree-Law No. 286, article 13(5*bis*), 1998 Law No. 40, article 11(3); Japan, 1951 Order, articles 2(15), 13(6)-(7), 39-44; Kenya, 1967 Act, articles 8(8), 12(1); Malaysia, 1959-1963 Act, article 35; Nigeria, 1963 Act, articles 23(1), 25, 31, 43; Panama, 1960 Decree-Law, article 60; Poland, 2003 Act No. 1775, article 101; Portugal, 1998 Decree-Law, articles 24, 107, 117, 126(1); Republic of Korea, 1992 Act, articles 2(11)-(12), 51-57, 1993 Decree, articles 63-73, 75; Sweden, 1989 Act, sections 5.6-7, 6.1-9, 6.11-13, 6.18-19; Switzerland, 1931 Federal Law, article 13a(b)-(c), (e); and United States, INA, sections 232(a), 235(b)(2), 236, 236A, 238, 505-07. Special provisions may apply in this respect to an alien allegedly involved in terrorism (United States, INA, sections 103(a)(11), 236A, 505-07).

[1436] Australia, 1958 Act, articles 192, 252, 258A, 261AA; Brazil, 1980 Law, article 68; Canada, 2001 Act, articles 55(1), (2)(a), 58(1)(b)-(d), (2), 82(1); China, 1986 Law, article 27; Hungary, 2001 Act, article 48(1); Kenya, 1967 Act, article 12(1); Portugal, 1998 Decree-Law, article 126(1); and Sweden, 1989 Act, sections 6.1, 6.2(2).

[1437] Australia, 1958 Act, articles 4AA, 252A(3)(c)(ii), 252B(1)(f)-(g); Canada, 2001 Act, article 60; and Sweden, 1989 Act, sections 6.2-5, 6.19.

[1438] Belarus, 1999 Council Decision, article 9.

[1439] Austria, 2005 Act, article 3.76(2); and Canada, 2001 Act, article 55(2).

[1440] Belarus, 1999 Council Decision, article 9.

[1441] Ibid.

[1442] Canada, 2001 Act, article 82(1); and United States, INA, section 506(a)(2). Special provisions may apply in this respect to a permanent resident allegedly involved in terrorism (United States, INA, section 506(a)(2)).

[1443] Australia, 1958 Act, articles 197AB-AG; Bosnia and Herzegovina, 2003 Law, article 43(3); Brazil, 1980 Law, articles 72-73; China, 1986 Law, article 27, 2003 Provisions, article 183; Colombia, 1995 Decree, article 93; Iran, 1931 Act, article 12; Madagascar, 1962 Law, article 17; and Switzerland, 1931 Federal Law, article 13e.

[1444] Belarus, 1999 Council Decision, article 17.

[1445] Czech Republic, 1999 Act, section 124(1)-(2).

[1446] Hungary, 2001 Act, articles 46(3), 48(2).

may expressly permit[1447] or prohibit,[1448] or at the Government's discretion authorize,[1449] a court to order the alien's release from detention. A State may impose a fine or imprisonment on an alien who escapes from detention or an assigned residence, or who commits certain acts during detention.[1450] A State may expressly bind itself to pay the expenses of the alien's detention.[1451]

4. Right to submit reasons against expulsion

(a) General considerations

612. The right of an alien to submit reasons against the expulsion has been recognized in treaties and other international instruments, as well as in national law and literature.[1452]

[1447] Canada, 2001 Act, articles 83, 84(2).

[1448] Australia, 1958 Act, articles 183, 196(3); and Czech Republic, 1999 Act, section 171.

[1449] Sweden, 1989 Act, section 6.12.

[1450] Australia, 1958 Act, articles 197A-B; Canada, 2001 Act, articles 124(1)(b), 125; Italy, 2005 Law, article 14(4), 1998 Decree-Law No. 286, article 14(*5ter*)-(*5quater*), 1996 Decree-Law, article 7(3); Japan, 1951 Order, article 72(1)-(2); and Republic of Korea, 1992 Act, articles 95(8)-(9), 97(5).

[1451] United States, INA, section 103(a)(11).

[1452] "In the *Chevreau* case, which concerned the deportation of a Frenchman by the British authorities from an area in Persia occupied by them in the belief that he was a spy, the sole arbitrator Beichmann stated that, in cases of arrests, suspicions must be verified by a serious enquiry, in which the arrested person is given opportunity to defend himself against the suspicions directed against him. Similar principles are thought to apply to deportations, even though deporting States may not be signatories of the United Nations Covenant on Civil and Political Rights. Article 13 of this Covenant provides that aliens shall be allowed to submit reasons against their expulsion, and have their cases reviewed by, and be represented before, the competent authority for this purpose, unless compelling reasons of national security otherwise require. International customary law may possibly now contain principles similar to that of Article 13. The law of many countries provides for representations to be made against deportation orders, and for their review by courts and tribunals." Vishnu D. Sharma and F. Wooldridge, note 579 above, pp. 405-406 (citing the *Chevreau* case, II U.N.R.I.A.A. 1113) (other citations omitted). "It will be recalled that the principal vice imputed to Great Britain in the *Chevreau* case was its failure to initiate an enquiry into the allegations against the alien, and to afford the latter an opportunity of presenting his case. […] There is, however, some support for the proposition that a decision to deport an alien from a territory in which he is lawfully present is arbitrary, save where there are overwhelming considerations of national security to the contrary, unless he ... is afforded an opportunity to advance reasons against his deportation, before some competent authority independent of those proposing to deport him. Such a proposition is a reflection of the general rule of law known in England as *audi alteram partem* and in France as part of the *droits de la défense.* The principle has been expressed by the Court of Justice of the European Communities on the basis of comparative law, as follows: 'a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known'. The same principle finds expression in Article 23 of the Constitution of the U.S.S.R. and may properly claim to be a general principle of law, within the meaning of Article 38(l)(c) of the Statute of the International Court of Justice. The principle appears to be reflected in Article 13(2) of the International Covenant on Civil and Political Rights ... The Article as a whole appears to go further than customary law requires. In particular, there is insufficient basis in State

613. Article 13 of the International Covenant on Civil and Political Rights provides the individual expelled, unless "compelling reasons of national security otherwise require", with the right to submit the reasons against his or her expulsion. This article provides:

> "An alien lawfully in the territory of a State Party to the present Covenant … shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion …"[1453]

614. The same guarantee is contained in article 7 of the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144:[1454]

> "An alien lawfully in the territory of a State … shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled …"

615. Article 1, paragraph 1 (a), of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides:

> "Article 1 – Procedural safeguards relating to expulsion of aliens
>
> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> "a. to submit reasons against his expulsion,
>
> […]

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practice to maintain that States which are not bound by that Article are obliged to allow aliens to be represented; and the language of the Article implies a greater degree of formality in the review than is required by application of customary law or general principles of law. For this reason the Article represents an important addition to the alien's procedural guarantees, in States that have agreed to be bound by it. Nevertheless, the *travaux préparatoires* of the Article reveal no evidence for the proposition that the principle applied in the *Chevreau case* no longer represents good law. On the contrary, they appear to reveal a silent acceptance of the proposition that the alien must be given an opportunity to refute the allegation made against him, save in case of grave necessity." Richard Plender, *International Migration Law.* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, pp. 471-472 (quoting Case 17/74, *Transocean Marine Paint* v *Commission,* [1974] E.C.R. 1063 at 1080) (other citations omitted).

[1453] *See* Human Rights Committee, *Giry v. Dominican Republic,* United Nations Human Rights Committee, 20 July 1990, International Law Reports, E. Lauterpacht (ed.), C.J. Greenwood, volume 95, pp. 321-327, at p. 325, para. 5.5. (The Committee found that Dominican Republic had violated article 13 of the Covenant by omitting to take a decision "in accordance with law", to give the person concerned an opportunity to submit the reasons against his expulsion and to have his case reviewed by a competent authority.)

[1454] Resolution 40/144, Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, 13 December 1985.

> "2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security." [Emphasis added.]

616. The same guarantee is contained in article 3, paragraph 2, of the European Convention on Establishment, which provides:

> "Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion …"

617. Attention may also be drawn to article 7 of the Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union,[1455] which provides:

> "Nationals of any Contracting Party who have been authorized to settle in the territory of another Contracting Party may be expelled only after notification of the Minister of Justice of the country of residence by a competent authority of that country, before which the persons concerned may avail themselves of their means of defence …"

618. The right to submit reasons against the expulsion is also recognized in national laws. According to the relevant national legislation, an alien may be allowed (1) to present any supporting reasons or evidence;[1456] (2) to cross-examine or otherwise question witnesses;[1457] or (3) to review evidence in all[1458] or certain[1459] cases, or only when public order or security concerns so allow.[1460]

[1455] Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union, Brussels, 19 September 1960, United Nations, *Treaty Series*, vol. 480, No. 5471, p. 424.

[1456] Such permission can be given: (1) when the alien contests an expulsion or refusal of entry (Bosnia and Herzegovina, 2003 Law, article 76(2); France, Code, article L522-2; Japan, 1951 Order, article 10(3); Madagascar, 1962 Law, article 16; Sweden, 1989 Act, section 6.14; and United States, INA, sections 238(b)(4)(C), (c)(2)(D)(i), 240(b)(4)(B)); (2) subject to conditions, when the alien is alleged to be involved in terrorism (United States, INA, section 504(c)(2), (e)-(f)); or (3) when the alien requests permission to re-enter the State after having been expelled (France, Code, article L524-2).

[1457] Canada, 2001 Act, article 170(e); Japan, 1951 Order, article 10(3); and United States, INA, sections 238(c)(2)(D)(i), 240(b)(4)(B). Such permission may be specifically granted when the process concerns the alien's claim of protected status (Canada, 2001 Act, article 170(e)) or, subject to conditions, when the alien is alleged to be involved in terrorism (United States, INA, section 504(c)(3), (e)). A State may permit the relevant authority to order the presence of witnesses requested by the alien (Japan, 1951 Order, article 10(5); and United States, INA, section 504(d)(1)). Such authorization may be specifically granted when the alien is alleged to be involved in terrorism (United States, INA, section 504(d)(1)). In such circumstances, a State may, subject to conditions, bind itself to pay for the attendance of a witness called by the alien (United States, INA, section 504(d)(2)).

[1458] Bosnia and Herzegovina, 2003 Law, article 76(2); and United States, INA, section 238(b)(4)(C), (c)(2)(D)(i).

[1459] Sweden, 1989 Act, section 11.2.

[1460] Switzerland, 1931 Federal Law, article 19(2); and United States, INA, sections 240(b)(4)(B), 504(c)(3), (d)(5), (e).

However, a State may deny an alien alleged to be involved in terrorism the right to suppress illegally obtained evidence.[1461]

(b) Right to a hearing

619. The right of an alien to submit arguments against his or her expulsion may be exercised through several means, including a hearing.

620. Although article 13 of the International Covenant on Civil and Political Rights does not expressly grant the alien the right to a hearing,[1462] the Human Rights Committee has expressed the view that a decision on expulsion adopted without the alien having been given an appropriate hearing may violate article 13 of the Covenant:

> "The Committee is also concerned that the Board of Immigration and the Aliens Appeals Board may in certain cases yield their jurisdiction to the Government, resulting in decisions for expulsion or denial of immigration or asylum status without the affected individuals having been given an appropriate hearing. In the Committee's view, this practice may, in certain circumstances, raise questions under article 13 of the Covenant."[1463]

621. Several national laws grant the alien expelled a right to a hearing in the context of an expulsion procedure.[1464] More specifically, a State may give the alien a right to a

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[1461] United States, INA, section 240(e)(1)(B).

[1462] "The right to a hearing is not as far-reaching as in criminal proceedings pursuant to Art. 14(3). The formulation 'to submit evidence to clear himself', which was adopted from Art. 32(2) of the Refugee Convention, was replaced in the HRComm with 'to submit the reasons against his expulsion', although this did not change the substance of the right. Even though the reasons against a pending expulsion should, as a rule, be asserted in an oral hearing, Art. 13 does not, in contrast to Art. 14(3)(d), give rise to a right to personal appearance. However, in the case of a Chilean refugee against the Netherlands, the Committee rejected the communication with the reasoning that the author had been given sufficient opportunity to submit the reasons against his expulsion in formal proceedings, which included oral hearings. In the *Hammel* and *Giry* cases, a violation of Art. 13 was found because the authors had been given no opportunity to submit the reasons arguing against their expulsion and extradition, respectively." Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Kehl am Rhein, N.P. Engel Publisher, 1993, pp. 228-229 (citing Chilean refugee case, No. 173/1984, § 4; *V.M.R.B. v. Canada,* No. 236/1987; *Hammel case*, No. 155/1983, §§ 19.2, 20; and *Giry* case, No. 193/1985, §§ 5.5,6).

[1463] Concluding observations of the Human Rights Committee: Sweden, 1 November 1995, A/51/40 (vol. 1), paras. 73-98, at para. 88.

[1464] "Judicial inquiry, with its basis in formal investigation and the proof of facts, is a surer guard against abuse than the free exercise by governments of a power of expulsion based on vague and indefinite allegations. […] In the systems examined, limited in number though they have been, there is recognition also of the requirement of a hearing as a necessary precondition to the making or execution of an order of expulsion. Some States will permit an appeal on the merits, while others simply allow the alien to put forward representations. But in every case it is open to the alien to challenge the legality of the measure, and to require that the law control not only formal illegality, but also the arbitrary or abusive exercise of power. Once again, the emphasis is on the inherently hearing,[1465] or identify conditions under which a hearing need not be conducted.[1466] The hearing may be required to be public,[1467] closed,[1468] or held *in camera* only when secrecy is required due to the nature of the evidence.[1469] If the alien does not attend the hearing, the relevant authorities or court may be permitted to proceed when the alien so consents,[1470] or per statutory authorization.[1471] A State may reimburse the alien's expenses with respect to the hearing,[1472] or require that a deposit be made to insure the alien's compliance with conditions relating to the hearing.[1473]

622. Numerous national tribunals have recognized the right of an alien to a hearing regarding an order of expulsion, on the basis of national constitutional, jurisprudential or statutory law.[1474] The

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discretionary nature of the 'right' of expulsion. However, it may be noted that, while the standards of international law favour a system of appeals, it is recognized that exceptions may be made in 'security' cases. State practice indicates a possibly equivocal attitude to the exercise of power by others on such occasions, and this is some evidence of a claim to an absolute discretion in political or security matters. Nevertheless, there does not appear to be any objection in principle to the introduction of guiding rules even in this area; the requirement of good faith certainly stands already at the perimeter of the field of competence." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 207 and 309 (citations omitted). "Customary international law also does not require the granting of judicial protection against expulsion probably because a right of sojourn in a foreign territory is not recognized in the absence of treaty obligations. If municipal law guarantees the alien access to the courts, for example as a check on arbitrary expulsion, this guarantee rests only on the municipal law concerned, which often surpasses the exigencies of international law. " Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 111.

[1465] Australia, 1958 Act, article 203(3); Belarus, 1998 Law, article 29; Bosnia and Herzegovina, 2003 Law, article 76(2); Canada, 2001 Act, articles 44(2), 78(a), 170(b), 173(a), 175(1)(a); France, Code, articles L213-2, L223-3, L512-2, L522-1(I)(2), L524-1; Italy, 1998 Decree-Law No. 286, articles 13(5*bis*), 13*bis*, 14(4), 17, 1998 Law No. 40, article 15(1); Japan, 1951 Order, articles 10, 47(4), 48(1)-(8); Republic of Korea, 1992 Act, article 89(2); Madagascar, 1994 Decree, articles 35-36, 1962 Law, article 15; Portugal, 1998 Decree-Law, articles 22(1), 118(1)-(2); Sweden, 1989 Act, section 6.14; and United States, INA, sections 216A(b)(2), 238(c)(2)(D)(i), 240(b)(1), 504(a)(1). Such a right may be specifically conferred on an alien allegedly involved in terrorism (United States, INA, section 504(c)(5)(g)).

[1466] Canada, 2001 Act, articles 44(2), 170(f); and United States, INA, sections 235(c)(1), 238(c)(5).

[1467] France, Code, articles L512-2, L522-2; and United States, INA, section 504(a)(2).

[1468] Madagascar, 1994 Decree, article 37, 1962 Law, article 16.

[1469] Canada, 2001 Act, article 166; and Sweden, 1989 Act, section 6.14.

[1470] United States, INA, section 240(b)(2)(A)(ii).

[1471] Belarus, 1998 Law, article 29; and France, Code, article L512-2.

[1472] Sweden, 1989 Act, section 6.15.

[1473] Canada, 2001 Act, article 44(3).

[1474] See, e.g., *Wong Yang Sung v. McGrath, Attorney-General, Et Al.*, United States, Supreme Court, 20 February 1950, *International Law Reports*, 1950, H. Lauterpacht (ed.), Case No. 76, pp. 252-256. "But the difficulty with reasons for such a hearing, as well as its requirements, were explained by the Supreme Court of the United States in *Wong Sang Yung v. McGrath* as follows:

> "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."[1475]

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any argument premised on the proposition that the deportation statute does not require a hearing, is that without such a hearing there would be no constitutional authority for deportation."; "Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus." *Nicoli v. Briggs,* United States, Circuit Court of Appeals, Tenth Circuit, 7 April 1936, *Annual Digest and Reports of Public International Law Cases*, 1935-1937, H. Lauterpacht (ed.), Case No. 162, pp. 344-345, at p. 345. "To put it simply, there are three inter-related stages, one leading to the other. *At the first,* the order is made *ex parte,* administratively and subjectively, without a right of hearing (for reasons already explained). *At the second stage*, it is open to representations when cause could be shown as to why it should not stand or why the time should be extended. Here the original administrative function is ousted and the authority assumes a quasi-judicial mantle, to 'inquire into' and 'decide' what might be issues of grave personal consequence. *At the third stage,* the result will determine its effect, whether it should be nullified, suspended or enforced." *Brandt v. Attorney-General of Guyana and Austin,* Court of Appeal, 8 March 1971, *International Law Reports*, volume 70, E. Lauterpacht, C.J. Greenwood (eds.), pp. 450-496, at p. 468; *Re Hardayal and Minister of Manpower and Immigration,* Canada, Federal Court of Appeal, 20 May 1976, *International Law Reports*, volume 73, E. Lauterpacht, C.J. Greenwood (eds), pp. 617-626 (Hearing required for the cancellation of the residence permit. Since the permit conferred rights on the individual, the cancellation procedure was quasi-judicial and thus subject to judicial review.); *Gooliah v. Reginam and Minister of Citizenship and Immigration,* Court of Appeal of Manitoba, Canada, 14 April 1967, *International Law Reports*, volume 43, E. Lauterpacht (ed.), pp. 219-224 ("Appellant has a right to a hearing with an impartial arbiter. When bias in fact is demonstrated by the record of the proceedings, appellant has a valid appeal."). In France, a hearing is required except in cases of urgency. *See*, e.g., *Mihouri,* France, Conseil d'État, 17 January 1970, *International Law Reports*, volume 70, E. Lauterpacht, C.J. Greenwood (eds.), pp. 358-359, at p. 359 "[Although in cases of urgency the there is no right to a hearing prior to expulsion,] It does not appear from the evidence that the expulsion of Mihouri who was, at the date of the expulsion order, detained in the prison at Compiègne where he was serving a sentence of six months imprisonment, was of such absolute urgency as to dispense the Administration from respecting the formalities laid down in Articles 24 and 25 of the Ordinance of 2 November 1945."

[1475] *Wong Yang Sung v. McGrath, Attorney-General, Et Al.,* United States, Supreme Court, 20 February 1950, *International Law Reports*, 1950, H. Lauterpacht (ed.), Case No. 76, pp. 252-256, at pp. 254-255.

623. Other courts have held that no such hearing was required.[1476] For commonwealth countries, such a conclusion normally relates to a holding that the expulsion decision is purely administrative and not judicial or quasi-judicial.[1477]

(c) Right to be present

624. The presence of an alien in the expulsion proceedings is either guaranteed or required in the legislation of several States. A State may give the alien a right to appear personally during consideration of the alien's potential expulsion,[1478] or summon or otherwise require the alien to attend a relevant hearing.[1479] A State may likewise permit the presence of the alien's family member or acquaintance.[1480] A State may penalize the alien's failure to attend a hearing by ordering the alien's expulsion and inadmissibility for a set length of time.[1481] An alien's absence may be excused if it is

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[1476] "No machinery is provided by sec. 22 of the Act or any other section for the hearing of a person against whom the Minister may propose to cause a deportation order to be issued… The most that can be contended for is that any person concerned should be given an opportunity to make representations to the Minister before he acts under sec. 22." *Urban v. Minister of the Interior,* South Africa, Supreme Court, Cape Provincial Division, 30 April 1953, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 340-342, at pp. 341-342. "Article 6 of the [European Convention on Human Rights] provides that, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a hearing by a tribunal in accordance with certain procedural safeguards. The imposition of a penalty of a prohibition on residence against an alien, however, constitutes neither civil nor criminal proceedings and Article 6 of the Convention is inapplicable to a procedure leading to measures of the type taken by the authorities in this case." *H v. Directorate for Security of the Province of Lower Austria,* Constitutional Court, 27 June 1975, *International Law Reports*, volume 77, E. Lauterpacht (ed.), C.J. Greenwood, pp. 443-447, at p. 446. "It seems to me that the Aliens Control Act 1966 is a statute which impliedly indicates exclusion of the right of hearing to aliens whose permit to reside in the country is withdrawn or about to be withdrawn. In my opinion the function of the Minister in considering whether to cancel a permit is purely an administrative one and not in any way quasi-judicial." *Smith v. Minister of Interior and Others,* Lesotho, High Court, 8 July 1975, *International Law Reports*, volume 70, E. Lauterpacht, C.J. Greenwood (eds.), pp. 364-372, at p. 370.

[1477] *See*, e.g., *Smith v. Minister of Interior and Others,* Lesotho, High Court, 8 July 1975, *International Law Reports*, volume 70, E. Lauterpacht, C.J. Greenwood (eds.), pp. 364-372; *Urban v. Minister of the Interior,* Supreme Court, Cape Provincial Division, 30 April 1953, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 340-342.

[1478] Belarus, 1998 Law, article 29; Bosnia and Herzegovina, 2003 Law, article 76(2)-(3); Canada, 2001 Act, articles 78(a)(i), 170(e); France, Code, articles L223-2, L512-2, L522-1(I)(2), L524-1; Italy, 1998 Decree-Law No. 286, articles 13(5*bis*), 14(4), 17, 1998 Law No. 40, article 15(1); Japan, 1951 Order, article 10(3); Madagascar, 1994 Decree, articles 35-36, 1962 Law, articles 15-16; Portugal, 1998 Decree-Law, article 118(2); Republic of Korea, 1992 Act, article 89(2)-(3); Sweden, 1989 Act, section 6.14; and United States, INA, sections 238(c)(2)(D)(i), 240(b)(2)(A)-(B), 504(c)(1). Such a right may be specifically conferred on an alien allegedly involved in terrorism (United States, INA, section 504(c)(1)).

[1479] Australia, 1958 Act, article 203(3); and Portugal, 1998 Decree-Law, article 118(1). A State may likewise require the alien's presence when the legality of the alien's detention is being reviewed (Canada, 2001 Act, article 57(3)).

[1480] Japan, 1951 Order, article 10(4).

[1481] United States, INA, sections 212(a)(6)(B), 240(b)(5)(A), (E), (7).

due to the alien's mental incapacity,[1482] or if the alien did not receive notice of the hearing or otherwise presents exceptional circumstances justifying the absence.[1483]

5. Right to consular protection

625. An alien expelled may be entitled to consular protection in accordance with international and national law.[1484] Attention may be drawn to articles 36 and 38 of the Vienna Convention on Consular Relations.[1485]

[1482] United States, INA, section 240(b)(3).

[1483] United States, INA, section 240(b)(5)(C), (e)(1).

[1484] "The alien against whom an order of deportation or expulsion has been made or is proposed to be made should have the right and be given facilities to communicate with the diplomatic or consular representatives of the alien's State. Deportation and expulsion cases constitute an area where diplomatic intervention for the protection of a national has been frequently availed of. There have been numerous cases where international arbitrations have awarded substantial damages to an alien for the wrongful act of expulsion or deportation by a State; a large body of jurisprudence has emerged out of these arbitrations." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 95. "Consuls not only protect the interests of the sending state, but must also be allowed by the receiving state to protect the nationals of the sending state. Consuls … render certain assistance and help to … litigants before the courts. If a foreign subject is wronged by the local authorities, his consul may give him advice and help, and eventually intervene on his behalf. He is entitled for that purpose to communicate with imprisoned nationals of his state. As a rule, a consul exercises protective functions over nationals of the sending state only; but the latter may, unless the receiving state objects, charge him with the protection of nationals of other states which have not nominated a consul for his district." Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, pp. 1140-1141, para. 547, n. 1 "See Vienna Convention, Art. 5(a), (d), (e), (g), (h) and (i), and Arts. 36-7. Consuls must, at the request of an arrested national, be informed by the authorities of the receiving state of the arrest or detention, and must be allowed to visit them in custody: Art. 36.1. However, failure to notify the consul of a national's arrest or the proceedings against him does not invalidate those proceedings: *Re Yater* (1973), ILR, *71,* p. 541."); n. 2 ("A consul may sometimes actually represent nationals of the sending state in legal proceedings, depending on the laws and practices of the sending and receiving states and any treaty between them: see O'Connell, *International Law* (2nd ed., 1970), pp. 915-6; Lee, *Consular Law and Practice* (2nd ed., 1991), p. 264ff; and, eg *Re Arbulich's Estate,* ILR, 19 (1952), No. 92; *Re Bedo's Estate,* ILR, 22 (1955), p. 551 (holding a consul's power to defend property rights of his state's nationals not to be dependent on a treaty stipulation to that effect); *Re Bajkic's Estate,* ILR, 26 (1958-11), p. 547; and note the statement made to the court by the US Department of State in *Sarelas v Rocanas* (1962), ILR, 33, p. 373. But the right to represent the sending state's nationals in litigation may not extend to a right to intervene in proceedings on the basis of the interests of those nationals as a general class: *DuPree v United States,* AJ, 72 (1978), p. 151."), n. 3 ("See the *Chapman Claim* (1930), 4 RIAA, pp. 632, 638."), n. 4 ("See Vienna Convention, Art. 36. See also Briggs, AJ, 44 (1950), pp. 254-7; Williams, ICLQ, 29 (1980), pp. 238-49; the *Chevreau Claim* (1931), 2 RIAA, pp. 1113, 1123-4; the *Faulkner Claim* (1926), 4 RIAA, pp. 67, 70.") and n. 6 (Vienna Convention, Art. 8).

[1485] Vienna Convention on Consular Relations, Vienna, 24 April 1963, United Nations, *Treaty Series,* vol. 596, No. 8638, p. 261. "Under the 1963 Convention on Consular Relations, a state that arrests' or detains a non-citizen must inform him of his right to contact consular officials of his home state and must communicate such a request to consular officials 'without delay'. Consular officials are given the right 'to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation'." Alexander T. Aleinikoff, note 119 above, p. 9 (quoting article 36 of the Convention). "It may be added that a failure on the part of an expelling State promptly to notify the consulate of an alien's State

626. Article 36, paragraph 1 (a) guarantees the freedom of communication between consular officers and nationals of the sending State. Since this guarantee is formulated in general terms, it would also apply within the context of an expulsion procedure. Article 36, paragraph 1 (b), dealing with the situation of individuals arrested, in prison, custody or detention, sets forth an obligation for the receiving State to inform the consular post of the sending State at the request of the person concerned and to inform the latter of his or her rights in this respect, and article 36, paragraph 1 (c) recognizes the right of consular offices to visit a national of the sending State who is detained.

> "Article 36 – Communication and Contact with Nationals of the Sending State
>
> "1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> "a. consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> "b. if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> "c. consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> "2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

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of nationality of his detention which a view to deportation will entail a breach of the Vienna Convention on Consular Relations, if both are parties to that treaty. That Convention also requires that aliens should be free to communicate with the consular officers of their State, and *vice versa,* and that consular officials shall have the right to visit nationals of their State and to arrange for their legal representation. In the latter respects the Convention appears to represent established international usage which has matured into a rule of customary law." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 471 (citing article 36 of the Convention; *Bigelow* v *Princess Zizianoff, Gazette du Palais,* 4 March 1928; P. Cahier and L. Lee, *International Conciliation,* 1969, 63).

627. Article 36 of the Vienna Convention on Consular Relations has been applied by the International Court of Justice in the *LaGrand* and *Avena* cases.[1486]

628. Moreover, article 38 of the Vienna Convention on Consular Relations allows consular officers to communicate with the authorities of the receiving State.

> "Article 38 – Communication with the Authorities of the Receiving State
>
> In the exercise of their functions, consular officers may address:
>
> a. the competent local authorities of their consular district;
>
> b. competent central authorities of the receiving State if and to the extent that this is allowed by the laws, regulations and usages of the receiving State or by the relevant international agreements."

629. Attention may be drawn to the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144. Article 10 of the Declaration enunciates the right for any alien to communicate at any time with the diplomatic or consular mission of his or her State:[1487]

> "Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in their absence, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides."

630. Given that such a right is affirmed in this Declaration in general terms, it appears to be applicable also in the event of an expulsion.

631. Some national laws explicitly recognize the right of an alien to seek consular protection in case of expulsion. More precisely, a State may permit the alien to communicate with diplomatic or consular representatives of the alien's State, or of any State providing representation services for the alien's State,[1488] when (1) the alien receives notice of the State's intent to pursue the alien's expulsion;[1489] (2) the alien is kept in a specific zone or location,[1490] or is otherwise held by the

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[1486] LaGrand Case (Germany v. United States of America), Judgment of 27 June 2001, paras. 64-91; Avena and other Mexican Nationals (Mexico v. United States of America), Judgment of 31 March 2004, paras. 49-114.

[1487] Resolution 40/144, Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, 13 December 1985.

[1488] United States, INA, section 507(e)(2).

[1489] France, Code, articles L512-1, L531-1, L551-2; Portugal, 1998 Decree-Law, article 24(1); and United States, INA, section 507(e)(2).

[1490] Portugal, 1998 Decree-Law, article 24(1).

State;[1491] (3) the alien is detained and allegedly involved in terrorism;[1492] or (4) a final expulsion decision has been made and the alien faces deportation.[1493] A State may permit diplomatic or consular personnel to arrange for the alien's departure or extension of stay, including when the alien has violated the terms of the alien's transitory status.[1494]

6. Right to counsel

632. The right of an alien to be represented by counsel in expulsion proceedings has been recognized to some extent in treaty law, national law and jurisprudence, and literature.[1495]

633. Article 13 of the International Covenant on Civil and Political Rights provides the alien expelled, unless "compelling reasons of national security otherwise require", with the right to have his or her case reviewed by a competent authority *and to be represented* before the latter.

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, *and be represented for the purpose* before, the competent authority or a person or persons especially designated by the competent authority." [Emphasis added.]

[1491] France, Code, article L551-2.

[1492] United States, INA, section 507(e)(2).

[1493] Belarus, 1999 Council Decision, article 18.

[1494] Chile, 1975 Decree, article 85.

[1495] "An effort has been made in this study to focus on the functional similarities and differences between deportation proceedings and the types of criminal proceedings with which the Supreme Court has recently been concerned. The aims and consequences of the two types of proceedings have been compared in order to evolve some standard of due process by which to judge deportation procedures in light of the procedures imposed by the Supreme Court in the criminal field. Any differences between the standards of procedural due process enforced in the two types of proceedings should be based on real, functional distinctions, and not on a formal distinction between 'criminal' proceedings, to which constitutional guarantees apply, and 'civil' proceedings, to which they do not. Measured by this criterion, it is difficult to defend a rule of law by which a person may be deprived of having the assistance of counsel in proceedings touching his vital interests simply because he cannot afford to pay, and because the proceedings are not technically called 'criminal.' Such a result is arbitrary and anachronistic and violates fundamental norms of fairness." William Haney, "Deportation and the Right to Counsel", *Harvard International Law Journal*, vol. 11, 1970, pp. 177-190, at p. 190 (citing United States Supreme Court decision, *In re* Gault, 387 U.S. 1, 50, 68 (1967)) (paragraph indentation omitted).

634. Such a right is expressly guaranteed by the Covenant only in the appeal proceedings.[1496] Article 7 of the Declaration annexed to General Assembly resolution 40/144[1497] contains the same wording as article 13 of the International Covenant on Civil and Political Rights:

> "An alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled and to have the case reviewed by, and *be represented for the purpose* before, the competent authority or a person or persons specially designated by the competent authority ...". [Emphasis added.]

635. At the European level, article 1, paragraph 1, of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms requires that an alien lawfully present in the territory of a State be allowed to be represented before the competent authority in the expulsion proceedings.

> "Article 1 – Procedural safeguards relating to expulsion of aliens
>
> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> a. to submit reasons against his expulsion,
>
> b. to have his case reviewed, and
>
> c. *to be represented for these purposes* before the competent authority or a person or persons designated by that authority.
>
> "2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security." [Emphasis added.]

[1496] "Art. 13 provides a right 'to be represented' ('se faisant représenter') in the expulsion proceedings. It follows from the wording, which was adopted from Art. 32(2) of the Refugee Convention, that this right is expressly guaranteed only in the proceedings before the appeals authority. A comparison with Art. 14(3)(d) further shows that a person threatened with expulsion is not entitled to *legal* counsel or to the appointment of an attorney. But following from the right to have oneself represented is the right to designate one's representative, such that the person concerned may have himself represented (at his own cost) by an attorney. Because an expulsion normally represents a serious interference in the life and basic rights sphere of the person concerned, and aliens are usually in particular need of legal counsel, the right to representation by a freely selected attorney is of fundamental importance. Practice before the Committee shows that most authors were in fact represented by counsel during the appeal proceedings." Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Kehl am Rhein, N.P. Engel Publisher, 1993, p. 231.

[1497] Resolution 40/144, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, 13 December 1985.

636. Similarly, article 3, paragraph 2 of the European Convention on Establishment provides:

> "Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, *and be represented for the purpose* before, a competent authority or a person or persons specially designated by the competent authority." [Emphasis added.]

637. Also worth mentioning is article 7 of the Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union,[1498] which provides:

> "Nationals of any Contracting Party who have been authorized to settle in the territory of another Contracting Party may be expelled only after notification of the Minister of Justice of the country of residence by a competent authority of that country, before which the persons concerned may avail themselves of their means of defence *and cause themselves to be represented or assisted by counsel of their own choice.* […]" [Emphasis added.]

638. The Committee against Torture stressed the importance of giving the individual expelled the possibility to contact his or her family *or lawyer* in order to avoid possible abuse, which may give rise to a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[1499] According to the Committee,

> "Where the decision to deport is administrative in nature, without the intervention of a judicial authority and without any possibility for the complainant to contact his/her family *or lawyer* places the complainant in a situation where s/he is particularly vulnerable to possible abuse and therefore may constitute a violation of Article 3."[1500] [Emphasis added.]

639. The legislation of several States guarantees the right to counsel in the event of an expulsion. A State may entitle the alien to be assisted by a representative,[1501] including specifically legal

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[1498] Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union, Brussels, 19 September 1960, United Nations, *Treaty Series*, vol. 480, p. 424.

[1499] *See* Part VII.C.3(b)(ii).

[1500] Committee against Torture, *Josu Arkauz Arana v. France*, Communication No. 63/1997, 9 November 1999, para. 11.5.

[1501] Japan, 1951 Order, article 10(3); and Panama, 1960 Decree-Law, article 85.

counsel[1502] or a person other than a legal counsel,[1503] during expulsion proceedings, including with respect to the alien's detention. A State may expressly permit the alien a free choice of counsel.[1504] A State may designate a representative for minors or other persons unable to appreciate the nature of the proceedings.[1505] A State may establish the inviolability of mail sent to the alien from the alien's lawyers or public counsel, or from relevant international bodies.[1506]

640. Some national courts, interpreting national legislation, have also upheld the right of an alien to be represented by counsel.[1507]

(a) Legal aid

641. With respect to the right of the expellee to be granted legal aid, attention may be drawn to the relevant legislation of the European Union, in particular to Council Directive 2003/109/EC of 25 November 2003, dealing with the situation of third country nationals who are long-term residents. Article 12 of the Directive provides:

[1502] Argentina, 2004 Act, article 86; Bosnia and Herzegovina, 2003 Law, article 76(3); Canada, 2001 Act, article 167(1); France, Code, articles L221-4, L221-5, L222-3, L512-1, L512-2, L522-2, L551-2, L555-3; Italy, 1998 Decree-Law No. 286, article 13(5), (8), 14(4), 1998 Law No. 40, articles 11(10), 15(1); Republic of Korea, 1992 Act, article 54; Madagascar, 1994 Decree, article 36, 1962 Law, article 15; Norway, 1988 Act, section 42; Portugal, 1998 Decree-Law, article 24(2); Spain, 2000 Law, article 26(2); Sweden, 1989 Act, sections 6.26, 11.1b, 11.8; and United States, INA, sections 238(a)(2), 239(a)(1)(E), (b), 504(c)(1), 507(e)(1). This right may be specifically accorded to minors (France, Code, article L222-3), or to an alien allegedly involved in terrorism (United States, INA, sections 504(c)(1), 507(e)(1)).

[1503] Bosnia and Herzegovina, 2003 Law, article 76(3); and France, Code, article L522-2.

[1504] France, Code, article L213-2; Madagascar, 1994 Decree, article 36; Portugal, 1998 Decree-Law, article 24(2); and United States, INA, sections 238(b)(4)(B), 239(a)(1), 240(b)(4)(A), 292.

[1505] Canada, 2001 Act, article 167(1); France, Code, articles L221-5, L222-3; and Sweden, 1989 Act, sections 11.1b, 11.8.

[1506] Sweden, 1989 Act, section 6.26.

[1507] See *Oudjit v. Belgian State (Minister of Justice)*, Conseil d'État, 10 July 1961, *International Law Reports*, volume 31, 1966, E. Lauterpacht (ed.), pp. 353-355, at p. 355 "According to Article 10 of the Law, the alien may be represented by an advocate before this Commission."; "Although appellant's statutory right to "counsel" at the deportation hearing conferred a right to legal representation at appellants own expense, an officer's statement that appellant could be represented by either a lawyer, friend or family member did not have the effect of depriving appellant of the right to counsel." *Re Immigration Act, Re Kokorinis,* Court of Appeal of British Columbia, 3 May 1967, *International Law Reports*, volume 43, E. Lauterpacht (ed.), pp. 225-229; "I am prepared to approach this appeal on the same assumption; but at the same time without deciding that 'counsel' in the Act and in the regulations does mean a practicing lawyer or even a qualified lawyer." *Re Vinarao,* Court of Appeal of British Columbia, 17 January 1968, *International Law Reports*, volume 44, E. Lauterpacht (ed.), pp. 163-168, at p. 166.

"4. Where an expulsion decision has been adopted, a judicial redress procedure shall be available to the long-term resident in the Member State concerned.

"5. Legal aid shall be given to long-term residents lacking adequate resources, on the same terms as apply to nationals of the State where they reside."[1508]

642. Mention can also be made of the concerns expressed by the Committee on the Rights of the Child about "ill-treatment of children by police during forced expulsion to the country of origin where, in some cases, they were deported without access to legal assistance …".[1509]

643. The right to legal aid in relation to an expulsion procedure is provided in the legislation of several States. Thus, a State may provide legal counsel or assistance to the alien at public expense.[1510] A State may also waive court fees if the alien is unable to pay them.[1511]

7. Translation and interpretation

644. With respect to the right to translation and interpretation in the expulsion proceedings, mention can be made of the concerns expressed by the Committee on the Rights of the Child about "ill-treatment of children by police during forced expulsion to the country of origin where, in some cases, they were deported without access to … interpretation".[1512]

645. The legislation of several States provides the alien expelled with a right to translation or interpretation. Thus, a State may in relevant situations (1) provide translation or interpretation assistance to the alien;[1513] (2) entitle the alien to receive communications in a language which the

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[1508] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, *Official Journal L 16*, pp. 44-53, at p. 50.

[1509] Concluding observations of the Committee on the Rights of the Child: Spain, 7 June 2002, CRC/C/15/Add.185 (13 June 2002), para. 44 (a).

[1510] Argentina, 2004 Act, article 86; France, Code, articles L221-5, L222-3, L522-2, L555-3; Italy, 1998 Decree-Law No. 286, article 13(8), 1998 Law No. 40, article 11(10); Norway, 1988 Act, section 42; Spain, 2000 Law, article 26(2); Sweden, 1989 Act, sections 6.26, 11.1b, 11.8-10; and United States, INA, section 504(c)(1). Such a right may be specifically conferred on an alien allegedly involved in terrorism (United States, INA, section 504(c)(1)). A State may in standard expulsion cases provide to the alien a list of legal counsel willing to work *pro bono*, without conferring on the alien a right to free representation (United States, INA, section 239(b)(2)-(3)). In contrast, a State may establish that the alien must bear the costs of counsel; *see* Canada, 2001 Act, article 167(1); and United States, INA, sections 238(b)(4)(B), 240(b)(4)(A), (5)(A), 292.

[1511] Argentina, 2004 Act, articles 87-88; and Norway, 1988 Act, section 42.

[1512] Concluding observations of the Committee on the Rights of the Child: Spain, 7 June 2002, CRC/C/15/Add.185 (13 June 2002), para. 44 (a).

[1513] Argentina, 2004 Act, article 86; Australia, 1958 Act, articles 258B, 261AC; Bosnia and Herzegovina, 2003 Law, articles 8(3), 76(3); France, Code, articles L111-8, L221-4, L221-7, L222-3, L223-3, L512-2, L522-2; Italy, 1998 Decree-Law No. 286, article 13(7); Republic of Korea, 1992 Act, articles 48(6)-(7), 58; Portugal, alien understands;[1514] (3) use a language which the alien understands throughout the relevant proceedings;[1515] (4) use the language of the place in which the relevant authority sits;[1516] (5) pay a private interpreter's compensation and expenses;[1517] or (6) place legal obligations on the interpreter with respect to the form of the printed record.[1518]

646. In *Sentence N. 257 (2004)*, the Constitutional Court of Italy upheld the constitutionality of issuing an expulsion decree in English, French or Spanish, where it was not possible to notify the alien in his or her native language or another language actually spoken by the alien. The Court reasoned that such a procedure met certain reasonably functional criteria, and guaranteed to a reasonable degree that the contents of such a decree would be understandable to the recipient.[1519]

8. Decision

(a) Notification of the decision

647. As early as in 1892, the Institut de Droit international expressed the view that "The expulsion order shall be notified to the expellee."[1520] Moreover, "If the expellee is entitled to appeal to a superior judicial or administrative court, the expulsion order must indicate this and state the deadline for filing the appeal."[1521]

648. Concerning the European Union, attention may be drawn to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004. Article 30, paragraph 1 of the Directive,

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1998 Decree-Law, article 24(1); and Spain, 2000 Law, article 26(2). Such a right may be specifically accorded to minors (France, Code, article L222-3), or with respect to an identification test or other investigation (Australia, 1958 Act, articles 258B, 261AC; and Republic of Korea, 1992 Act, articles 48(6)-(7), 58).

[1514] Australia, 1958 Act, articles 258B, 261AC; Belarus, 1999 Council Decision, article 17; France, Code, articles L213-2, L221-4; Italy, 1998 Decree-Law No. 286, articles 2(6), 4(2), 13(7), 1998 Law No. 40, articles 2(5), 11(7), 1996 Decree-Law, article 7(3); and United States, INA, section 240(b)(7).

[1515] France, Code, article L111-7. A State may expect the alien to indicate which language or languages the alien understands (France, Code, article L111-7), or to indicate a preference from among the languages offered (Italy, 1998 Decree-Law No. 286, article 2(6), 1998 Law No. 40, article 2(5)). A State may establish a default language or languages when the alien does not indicate a language (France, Code, article L111-7), or when it is otherwise impossible to provide the alien's indicated language (Italy, 1998 Decree-Law No. 286, articles 2(6), 4(2), 13(7), 1998 Law No. 40, articles 2(5), 11(7), 1996 Decree-Law, article 7(3)).

[1516] Switzerland, 1949 Regulation, article 20(3).

[1517] Sweden, 1989 Act, section 11.5.

[1518] Republic of Korea, 1992 Act, articles 59(2), 60(1)-(2).

[1519] See Sentenza No. 257, La Corte Costituzionale, Italy, 18 July 2004.

[1520] *Règles internationales*, note 56 above, article 30 [French original].

[1521] Ibid., article 31 [French original].

which deals with the notification of an expulsion measure affecting a citizen of the European Union or his or her family members, sets forth the obligation to notify a decision on expulsion and specifies that the notification shall include the indication of the possibilities of appeal, if any, as well as the time allowed to leave the territory of the State.

> "Article 30: Notification of decisions
>
> "1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), [i.e., decisions restricting the freedom of movement or residence of EU citizens and their family members] in such a way that they are able to comprehend its content and the implications for them.
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> [...]
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> "3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification."

649. The requirement that a decision on expulsion be notified to the alien concerned is contained in the legislation of several States.[1522] Such a notification would usually take the form of a written decision.[1523] Depending on the relevant legislation, the notification shall include the manner of the alien's deportation;[1524] the alien's State of destination upon deportation;[1525] a State to which the protected alien shall not be sent;[1526] or a delay in the deportation.[1527]

[1522] France, Code, articles L512-3, L514-1(1); Guatemala, 1986 Decree-Law, article 129; Iran, 1931 Act, article 11; Japan, 1951 Order, article 48(8); and Republic of Korea, 1992 Act, articles 59(1), 60(4). Such notification may be with specific respect to a decision not to expel the alien (Republic of Korea, 1992 Act, articles 59(1), 60(4)).

[1523] "In many countries, the power of expulsion or deportation is regulated by statute which specifies the grounds on which it may be exercised and the procedural safeguards that should be followed. These statutes usually apply the generally accepted principles of international human rights. Thus it is usually provided: that no person be expelled or reported from the territory of a State except … pursuant to a written order conforming to law; that the order be communicated to the person sought to be expelled or deported along with the grounds on which it is based … The requirement that an order of deportation or expulsion should be in writing and in accordance with the law of the State is designed to safeguard against an arbitrary exercise of power. [See Governing Rule 4.]" Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 91 (paragraph indentation omitted).

[1524] Bosnia and Herzegovina, 2003 Law, article 62(3).

[1525] Ibid., article 64(2).

[1526] Portugal, 1998 Decree-Law, article 114(1)(d).

[1527] Iran, 1931 Act, article 11.

(b) Reasoned decision

650. There are some authorities upholding the right of an alien to be informed of the reasons for his or her expulsion.[1528]

651. As early as in 1892, the Institut de Droit international considered that an expulsion order "… must be notified in fact and in law".[1529]

652. In the *Amnesty International v. Zambia case*, the African Commission on Human and Peoples' Rights held that Zambia had violated the right of the alien concerned to receive information, by omitting to supply him with the reasons of his expulsion:

> "40. … The Commission must, therefore, accept that William Steven Banda was not a Zambian by birth or descent.
>
> "41. This does not mean, however, that the Commission should not raise questions of law especially as the Zambian courts did not consider the obligations of Zambia under the African Charter. The court also failed to rule on the alleged reason for the deportation, namely, that his presence was likely "to endanger peace and good order in Zambia…". There was no judicial inquiry on the basis in law and in terms of administrative justice for relying on this 'opinion' of the Minister of Home Affairs for the action taken. The fact that Banda was not a Zambian by itself, does not justify his deportation. It must be proved that his presence in Zambia was in violation of the laws. To the extent that neither Banda nor Chinula were supplied with reasons for the action taken against them means that the right to receive information was denied to them (Article 9(1))."[1530]

653. Concerning the European Union, attention may be drawn to article 30, paragraph 2 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004. According to that provision, the notification of an expulsion measure affecting a citizen of the European Union or his or her family members shall include the grounds for the expulsion, unless this is "contrary to the interests of State security".

> "Article 30: Notification of decisions

[1528] "There is, however, some support for the proposition that a decision to deport an alien from a territory in which he is lawfully present is arbitrary, save where there are overwhelming considerations of national security to the contrary, unless he is informed of the allegations against him…". Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 472.

[1529] *Règles internationales*, note 56 above, article 30 [French original].

[1530] Communication No. 212/98, Amnesty International v. Zambia, *Twelfth Annual Activity Report*, 1998-1999, paras. 40-41.

> "2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security."

654. The Court of Justice of the European Communities confirmed that the individual expelled should be notified the reasons of the expulsion, unless grounds relating to national security make this unreasonable. The Court indicated that "The notification of the grounds relied upon to justify an expulsion measure or a refusal to issue a residence permit must be sufficiently detailed and precise to enable the person concerned to defend his interests."[1531]

655. The right of an alien to be informed of the reasons for his or her expulsion is not consistently recognized at the national level. In fact, national laws differ as to whether and as to the extent to which they grant the individual expelled the right to be informed of the reasons and justification of the expulsion. A State may require,[1532] expressly not require,[1533] or in certain instances not require[1534] a relevant decision to provide reasons or explanations. A State may require that the decision's reasoning correspond to the decision's consequences.[1535] A State may require a decision to be written[1536] or provided to the alien.[1537] A State may permit either the alien or the Government to require that reasons for a decision be provided.[1538]

[1531] Court of Justice of the European Communities, note 747 above, operative para. 4.

[1532] Canada, 2001 Act, article 169(b); France, Code, articles L213-2, L522-2, L551-2; Italy, 1998 Decree-Law No. 286, articles 13(3), 16(6), 1998 Law No. 40, article 11(3), 1996 Decree-Law, article 7(3); Japan, 1951 Order, articles 10(9), 47(3); Republic of Korea, 1993 Decree, articles 72, 74; Madagascar, 1994 Decree, article 37; Portugal, 1998 Decree-Law, articles 22(2), 114(1)(a); Spain, 2000 Law, article 26(2); Sweden, 1989 Act, section 11.3; Switzerland, 1949 Regulation, article 20(1), 1931 Federal Law, article 19(2); and United States, INA, section 504(c)(5)(j). Such a requirement may be imposed specifically when the decision concerns the alien's claim of protected status (Bosnia and Herzegovina, 2003 Law, article 75(5); and Canada, 2001 Act, article 169(c)-(d)), when the alien is allegedly involved in terrorism (United States, INA, section 504(c)(5)(j)), or when the alien comes from a State having a special arrangement or relationship with the expelling State (Sweden, 1989 Act, section 11.3).

[1533] Bosnia and Herzegovina, 2003 Law, article 28(1).

[1534] Sweden, 1989 Act, section 11.3.

[1535] Czech Republic, 1999 Act, section 9(3).

[1536] France, Code, articles L213-2, L551-2; Japan, 1951 Order, article 47(3); Republic of Korea, 1993 Decree, articles 72, 74; Switzerland, 1931 Federal Law, article 19(2); and United States, INA, section 504(c)(5)(j). Such a requirement may be imposed specifically when the decision concerns the alien's claim of protected status (Canada, 2001 Act, article 169(c)-(d)), or when the alien is allegedly involved in terrorism (United States, INA, section 504(c)(5)(j)). A State may allow for the removal of any sensitive information from the decision when the alien is alleged to be involved in terrorism (United States, INA, section 504(c)(5)(j)).

[1537] France, Code, articles L522-2, L551-2; Italy, 1998 Decree-Law No. 286, article 16(6); Japan, 1951 Order, articles 10(9), 47(3), 48(8); Republic of Korea, 1992 Act, article 59(1), 1993 Decree, article 74; Portugal, 1998 Decree-Law, articles 22(2), 120(2); and United States, INA, section 504(c)(5)(j).

[1538] Canada, 2001 Act, article 169(e).

656. Some national courts have also upheld the duty to inform an alien of the grounds on which the order of expulsion is based.[1539] However, it has normally not been required that the alien be informed prior to the issuance of the order to expel.[1540]

9. Review procedure

(a) Decision to expel

657. The right of an alien to have an expulsion decision reviewed by a competent body has been recognized in treaty law, international jurisprudence, national law and literature.[1541] It has been

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[1539] "And as soon as this much becomes clear, the reasons for the making of the order (except in acceptable cases of emergency and national security, etc., none of which here applies) must be communicated if the statutory right [to contest an order of expulsion] conferred is to have any value." *Brandt v. Attorney-General of Guyana and Austin,* Court of Appeal, 8 March 1971, *International Law Reports,* volume 70, E. Lauterpacht, C.J. Greenwood (eds.), pp. 450-496, at p. 465; "Under the Decree-Law of September 28, 1939, the Minister is not required to specify in an expulsion order the facts which led him to make the order. It is sufficient for him to state which of the special circumstances enumerated in the Decree-Law of September 28,1939, is relied on as a ground for the expulsion." *Bujacz v. Belgian State (Minister of Justice),* Conseil d'État, 13 July 1953, *International Law Reports,* 1953, H. Lauterpacht (ed.), pp. 336-337, at p. 337; "The order to leave the country is sufficiently particularized seeing that it refers to the special circumstances provided for in the Decree-Law of September 28, 1939, and that it appears from the file that the grounds relied on are substantiated by the facts." *Pieters v. Belgian State (Minister of Justice),* Conseil d'État, 30 September 1953, [*International Law Reports,* 1953, H. Lauterpacht (ed.), pp. 338-339; "The respondent is bound to state which of the exceptional circumstances provided for by the law of 28 September 1939 justifies the expulsion. That statement is a formality which is indispensable for the validity of the expulsion order." *Bertoldi v. Belgian State (Minister of Justice),* Conseil d'État, 19 May 1950, *International Law Reports,* 1950, H. Lauterpacht (ed.), Case No. 77, pp. 256-257, at p. 257; and *In re Velasco Tovar et al.,* Mexico Supreme Court, 3 October 1951 [*International Law Reports,* 1951, H. Lauterpacht (ed.), Case No. 94, pp. 308-309.

[1540] See *Oudjit v. Belgian State (Minister of Justice),* Conseil d'État, 10 July 1961, *International Law Reports,* volume 31, 1966, E. Lauterpacht (ed.), pp. 353-355, at p. 355 "The Minister of Justice was not bound to notify the petitioner of the transmission of a proposed decree of expulsion to the Council of Ministers."; "To put it simply, there are three inter-related stages, one leading to the other. *At the first,* the order is made *ex parte,* administratively and subjectively, without a right of hearing (for reasons already explained)." *Brandt v. Attorney-General of Guyana and Austin,* Court of Appeal, 8 March 1971, *International Law Reports,* volume 70, E. Lauterpacht, C.J. Greenwood (eds.), pp. 450-496, at p. 468.

[1541] "Nevertheless, the growth of international intercourse has tended to limit the exercise of the right of expulsion, and by municipal law and treaty many states have now limited their freedom of action…by permitting judicial recourse against administrative orders … […] Primarily, indeed, expulsion is an act of state which escapes judicial review. In the case of countries where by treaty a right of residence and access to courts is assured to citizens of the United States, the Department of State has claimed that a citizen charged with a non-political crime is entitled to a judicial trial before his expulsion. […] The following features of recent developments in the exercise of the power of expulsion may be noted: … resort to judicial review is becoming more frequent." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1915, pp. 50, 52 and 55 (citing Wiener's claim *v.* Haiti, Mr. Gresham, Secretary of State, to Mr. Smythe, Nov. 5, 1894. For. Rel., 1895, II, 803. See also Santangelo (U. S.) *v.* Mexico, April 11, 1839, Moore's Arb. 3333 and Lapradelle's Recueil, I, 473). "In many countries, the power of suggested that this does not necessarily require review by a judicial body. It has also been suggested that the expulsion must be suspended pending the review procedure.[1542] It has further been suggested that the alien must be informed of the right of review.[1543]

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expulsion or deportation is regulated by statute which specifies the grounds on which it may be exercised and the procedural safeguards that should be followed. These statutes usually apply the generally accepted principles of international human rights. Thus it is usually provided… that the alien be afforded a reasonable opportunity to challenge the legality or the validity of the order in appropriate proceedings before a court of law … Except where a deportation or expulsion order is made pursuant to a recommendation of a court of law, the person against whom such an order is made should be given an opportunity to present to a competent authority his or her reasons why an order should not be made. Any adjudication proceedings that may be held to determine the merits of the case should be in accordance with due process and a right of appeal to an independent and impartial tribunal should be provided for except that no such appeal is allowed in some countries when compelling reasons of national security require such restriction." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 91. "It is plain that there is no general obligation in international law to afford a judicial review of the merits of a decision to expel an alien. Indeed, relatively few systems of law can be found in which every decision to deport an alien attracts a right of appeal; and in some the courts have expressly refrained from inferring the existence of such a right. Moreover, the distinction between review of merits and review of underlying legality appears insufficiently established in State practice, particularly in civilian jurisdictions, to constitute the basis of a rule of customary law universal in application. […] The principle appears to be reflected in Article 13(2) of the International Covenant on Civil and Political Rights. This provides in part that an alien lawfully in the territory of a State party to that Covenant shall, except where compelling reasons of national security otherwise require, be allowed to have his case reviewed by a competent authority. The Article as a whole appears to go further than customary law requires." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 472 (citing, *inter alia*, the national jurisprudence, of Ghana, Supreme Court, *Captan* v *Minister of the Interior,* [1970] 2 G. and G. 457; Norway, *State* v *Czardas,* Norsk Retstidende (1955) 953 and India, *Union of India* v *H. Mohmed,* [1954] A.I.R. 505 (Bom.) (other citations omitted).

[1542] *See* also Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Seventh General Report on the CPT's activities covering the period 1 January to 31 December 1996, CPT/Inf (97) 10, 22 August 1997, "Foreign nationals detained under aliens legislation", para. 34: "In view of the CPT's essentially preventive function, the Committee is inclined to focus its attention on the question of whether the decision-making process as a whole offers suitable guarantees against persons being sent to countries where they run a risk of torture or ill-treatment. In this connection, the CPT will wish to explore whether the applicable procedure offers the persons concerned a real opportunity to present their cases, and whether officials entrusted with handling such cases have been provided with appropriate training and have access to objective and independent information about the human rights situation in other countries. Further, in view of the potential gravity of the interests at stake, the Committee considers that a decision involving the removal of a person from a State's territory should be appealable before another body of an independent nature prior to its implementation."

[1543] "The right to an appeal also raises the question of whether an alien affected 18 by an expulsion has a *right to be informed of the remedies* available to him. The right stressed by the Committee of being able to pursue effectively the remedies against an expulsion, and the fact that aliens are particularly in need of being informed of these remedies, indeed suggest that States Parties are under such an informational duty. In *Pinkney* v. *Canada,* however, a deportation order was issued against the author, a US black activist, while he was in pre-trial detention. Although he complained that the Canadian authorities had not informed him of his right to appeal this decision, the Committee declared this part of the communication inadmissible pursuant to Art. 5(2)(a) OP,

658. Several international treaties establish the requirement that an alien be given a possibility of review in the event of his or her expulsion.[1544] The scope of review may be limited to the legality of the expulsion decision rather than the factual basis for the decision.[1545] In this regard, a distinction has been drawn between a hearing which deals with questions of fact and law and an appeal which may be limited to questions of law.[1546]

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because the author had failed to exhaust these very remedies. On the other hand, in the *Cañón Garcia* case a violation of Art. 13 has been found notwithstanding the fact that the so-called 'Miranda rights' were read out to the author, and he was informed that he was detained in Ecuador 'by order of the United States Government'." Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Kehl am Rhein, N.P. Engel Publisher, 1993, p. 231 (citing, respectively, Case No. 27/1978, §§ 6,12-16; and No. 319/1988, § 2.4).

[1544] "The prescriptive requirement of decisions in accordance with the law necessarily implies that the discretion is confined and that decisions are controlled by the law. A full appeal on the merits, or even some special administrative tribunal which hears representations, may not be demanded, especially in political and security matters where the executive enjoys the widest margin of appreciation. But the rule of international law requires that there be available some procedure whereby the underlying legality of executive action can be questioned, such as the writ of habeas corpus in common-law jurisdictions. The additional requirement of a hearing on the merits or of an opportunity to make representations, although commonly found in municipal systems, cannot be said to have gained recognition as a rule of international law. The principle, however, may be offered *de lege ferenda.* But there can be no doubt that the first rule, which denies the arbitrary and capricious nature of expulsion, is to be accepted *de lege lata.* [...] General international law imposes as a precondition to the validity of an order of expulsion the requirement that it be made in accordance with law. This rule entails the further requirement that there should be available an effective remedy whereby an unlawful exercise of discretion may be challenged." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 275 and 308 (citations omitted).

[1545] "Generally the laws do not provide for a *judicial review* of the facts on which an administrative expulsion order is based. It was made clear in several countries by jurisprudence that such review is possible only in so far as the *legality* of the expulsion order is concerned." United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955, pp. 1-77. (ST/SOA.22 and Corr.2 (replaces Corr.1)), para. 76. "An appeal on the merits is clearly a procedural and substantive advantage, but it is the 'review of legality' which is principally inherent in the requirement that a decision on expulsion be 'in accordance with law'. It is remarkable that municipal law generally is not content simply to review the form of an order of expulsion, but that it is prepared also to examine the possibility of an absence of *bona fides.* This factor points up the character of the power as a controlled discretion and is further evidence of the limits which States admit to their powers. International law demands that an alien be permitted to obtain redress for wrongs done to him by the State in which he is present. The content of that law may, to a wide degree, be a matter of purely domestic concern. Indeed, the expelling State is in the best position, perhaps is the only authority competent, to pronounce upon such matters. Nevertheless, as Commissioner Nielsen observed in the *Neer Case,* there is clear recognition of the limits to sovereign competence in respect of matters which are the subject of domestic regulation: 'the domestic law and the measures employed to execute it must conform to the requirements of... international law, and .. . any failure to meet these requirements is a failure to perform a legal duty.'" Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 274 (quoting the *Neer* case, U.N. Rep., vol. IV, p. 60 (1926)) (other citations omitted).

[1546] "A useful distinction may be maintained, however, between the notion of a hearing and appeal on the one hand, and the availability of judicial review on the other. Not infrequently States will reserve to the executive branch the power of appreciating the facts and reasons behind an expulsion, while they will permit the judicial

659. Article 13 of the International Covenant on Civil and Political Rights entitles an alien lawfully present in the expelling State to a review procedure in relation to his or her expulsion. However, this provision does not specify the type of authority which should undertake the review:

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion *and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*"[1547] [Emphasis added.]

660. In relation to this provision, the Human Rights Committee has recalled that the right to a review, as well as the other guarantees provided in article 13, may be departed from only if "compelling reasons of national security" so require. The Human Rights Committee has also insisted on the need that the remedy at the disposal of the alien expelled be an effective one:

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branch to review the legality of their actions." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 265.

[1547] *See* Human Rights Committee, *Giry v. Dominican Republic*, United Nations Human Rights Committee, 20 July 1990, International Law Report, E. Lauterpacht (ed.), C.J. Greenwood, volume 95, pp. 321-327, at p. 325, para. 5.5. (The Committee found that Dominican Republic had violated article 13 of the Covenant by omitting to give the person concerned an opportunity to have his case reviewed by a competent authority.) A similar conclusion was reached by the Human Rights Committee in *Cañon Garcia v. Ecuador*, Communication No. 319/1988, U.N. Doc., CCPR/C/43/D/319/1988 (1991). "The International Covenant [on Civil and Political Rights] speaks of the alien's right to have his case reviewed, whereas the European Convention speaks of a right of appeal; moreover, the Covenant speaks of review by a competent authority 'or persons especially designated by a competent authority', thereby making plain that judicial review is not the only form of review contemplated." Richard Plender, *International Migration Law*, Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 484, n. 163. "Analogous to Art. 14(5), Art. 13 provides an express right to appeal to a higher authority. The appeals authority need not be a court. When an administrative authority is involved, the competent authority may delegate its decision-making power to one or more persons specifically designated for this purpose. The delegational power, disputed in the 3d Committee of the GA, was adopted literally from Art. 32(2) of the Refugee Convention." Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Kehl am Rhein, N.P. Engel Publisher, 1993, p. 229. "The Committee has found a violation of Art. 13 only in *Hammel v. Madagascar, Giry* v. *the Dominican Republic*, and *Cañón Garcia v. Ecuador*, because the authors had been denied the right to appeal their expulsion. […] Finally, in support of its decision [in the *Hammel case*], the Committee made express reference to its General Comment on the position of aliens under the Covenant, in which it stressed that 'an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one.' These decisions and formulations make it clear that the Committee interprets Art. 13 in such a way that the States Parties must *suspend an expulsion decision pending appeal*, so long as this is not opposed by compelling reasons of national security. The Committee thus seems to have departed from its earlier holdings, since in the *Maroufidou* case, in which the author was likewise deported by the Swedish authorities on the day of the expulsion decision and was able to submit an appeal only after re-entering the country illegally, it found that there was not 'any dispute in this case concerning the due observance by the State party of the procedural safeguards laid down in article 13'." Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Kehl am Rhein, N.P. Engel Publisher, 1993, pp. 229-230 (citing, respectively Case Nos. 155/1983,193/1985, 319/1988 and No. 58/1979, § 9.2.; and General Comment 15/27, § 10).

> "An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when 'compelling reasons of national security' so require."[1548]

661. The Human Rights Committee has also considered that protests with the expelling State's diplomatic or consular missions abroad are not a satisfactory solution under article 13 of the International Covenant on Civil and Political Rights:

> "(22) In the Committee's opinion, the discretionary power of the Minister of the Interior to order the expulsion of any alien, without safeguards, if security and the public interest so require poses problems with regard to article 13 of the Covenant, particularly if the alien entered Syrian territory lawfully and has obtained a residence permit. Protests lodged by the expelled alien with Syrian diplomatic and consular missions abroad are not a satisfactory solution in terms of the Covenant."[1549]

662. Article 13 of the European Convention on Human Rights recognizes a right to an effective remedy with respect to a violation of any right or freedom set forth in the Convention. This provision, which is applicable if an expulsion violates any such right or freedom,[1550] states:

[1548] Human Rights Committee, General Comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, para. 10. In the *Eric Hammel v. Madagascar* case (Communication No. 155/1983, 3 April 1987, U.N. Doc. Supp. No. 40 (A/42/40), para. 19 (2)), the Committee considered that the claimant had not been given an effective remedy to challenge his expulsion.

[1549] Concluding observations of the Human Rights Committee: Syrian Arab Republic, 5 April 2001, A/56/40 (vol. 1), para. 81 (22), p. 75.

[1550] In contrast, the applicability in case of expulsion of article 6 of the European Convention on Human Rights is less clear. "When no right under the Convention comes into consideration, only the procedural guarantees that concern remedies in general are applicable. While Article 6 only refers to remedies concerning 'civil rights and obligations' and 'criminal charges', the Court has interpreted the provision as including also disciplinary sanctions. Measures such as expulsion that significantly affect individuals should also be regarded as covered." Giorgio Gaja, note 28 above, pp. 309-310. Article 6 ("Right to a fair trial") of the European Convention on Human Rights provides as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> "3. Everyone charged with a criminal offence has the following minimum rights:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

663. According to the European Court of Human Rights, the effect of article 13 of the European Convention on Human Rights is

> "to require the provision of a domestic remedy allowing the competent 'national authority' both to deal with the substance of the relevant Convention complaint and to grant appropriate relief [...] However, Article 13 does not go so far as to require any particular form of remedy".[1551]

664. In respect of a complaint based on article 3 of the European Convention on Human Rights (see Part VII.C.3(b)(iv)) concerning a case of expulsion, the European Court of Human Rights held that article 13 requires scrutiny which

> "... must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threats to the national security of the expelling State."[1552]

665. As for the effect of the remedy on the enforcement of the decision, the Court, while recognizing the discretion enjoyed by States parties in this respect, indicated that measures whose effects are potentially irreversible should not be enforced before the national authorities have examined their compatibility with the Convention. On that basis, in the *Case of Conka v. Belgium* the Court reached the conclusion that there had been a violation of article 13 of the Convention:

> "The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible ... Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are

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"a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

"b) to have adequate time and facilities for the preparation of his defence;

"c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

"d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

"e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[1551] European Court of Human Rights, Concluding observations of the Human Rights Committee: Syrian Arab Republic, 5 April 2001, A/56/40 (vol. 1), para. 122.

[1552] European Court of Human Rights, *Case of Chahal v. United Kingdom,* Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 151.

compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision …"[1553]

666. Article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms grants the alien expelled the right to have the case reviewed by a competent authority:

> "Article 1 – Procedural safeguards relating to expulsion of aliens
>
> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> […]
>
> b. to have his case reviewed, and
>
> […]
>
> "2. An alien may be expelled before the exercise of his rights under paragraph 1. a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

667. Similarly, article 3, paragraph 2 of the European Convention on Establishment provides:

> "Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion *and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority*." [Emphasis added.]

668. Article 9, paragraph 5 of the European Convention on the Legal Status of Migrant Workers, article 83 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 32 of the Convention relating to the Status of Refugees and article 31 of the Convention relating to the Status of Stateless Persons also contain the requirement that there be a possibility of review of a decision on expulsion.

669. The right to a review procedure has also been recognized, in terms which are identical to those of article 13 of the International Covenant on Civil and Political Rights, by the General Assembly in article 7 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144:[1554]

[1553] European Court of Human Rights, *Case of Conka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application No. 51564/99, para. 79.

[1554] Resolution 40/144, Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, 13 December 1985, article 7.

> "An alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled and to have the case reviewed by, *and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority.*" [Emphasis added.]

670. In its general recommendation XXX, the Committee on the Elimination of Racial Discrimination stressed the need for an effective remedy in case of expulsion and recommended that States parties to the International Convention on the Elimination of All Forms of Racial Discrimination

> "Ensure that … non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies."[1555]

671. The requirement that the alien expelled be provided with a review procedure has also been stressed by the African Commission on Human and Peoples' Rights with respect to illegal immigrants:

> "The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is however of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter and international law."[1556]

672. Similarly, in another case, the African Commission on Human and Peoples' Rights held that Zambia had violated the African Charter on Human and Peoples' Rights by not giving an individual the opportunity to challenge an expulsion order:

> "36. Zambia has contravened Article 7 of the Charter in that he was not allowed to pursue the administrative measures, which were opened to him in terms of the Citizenship Act … By all accounts, Banda's residence and status in Zambia had been accepted. He had made a contribution to the politics of the country. The provisions of Article 12(4) have been violated.
>
> […]
>
> "38. John Lyson Chinula was in an even worse predicament. He was not given any opportunity to contest the deportation order. Surely, government cannot say that Chinula had

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[1555] Committee on the Elimination of Racial Discrimination, note 1164 above, para. 25. *See* also Concluding observations of the Committee on the Elimination of Racial Discrimination: France, 1 March 1994, A/49/18, para. 144 (recognizing the right of appeal).

[1556] African Commission on Human and Peoples' Rights, note 368 above, para. 20.

gone underground in 1974 having overstayed his visiting permit. Chinula, by all account, was a prominent businessman and politician. If government wished to act against him they could have done so. That they did not, does not justify the arbitrary nature of the arrest and deportation on 31 August 1994. He was entitled to have his case heard in the Courts of Zambia. Zambia has violated Article 7 of the Charter …

[…]

"52. Article 7(1) (a) states that:

'Every individual shall have the right to have his cause heard …

'(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed …'

"53. The Zambia government by denying Mr. Chinula the opportunity to appeal his deportation order has deprived him of a right to fair hearing which contravenes all Zambian domestic laws and international human rights laws."[1557]

673. The Parliamentary Assembly of the Council of Europe recommended that aliens expelled from the territory of a Member of the Council of Europe be entitled to a suspensive appeal which should be considered within three months from the date of the decision on expulsion:

> "With regard to expulsion: ii. any decision to expel a foreigner from the territory of a Council of Europe member state should be subject to a right of suspensive appeal; iii. if an appeal against expulsion is lodged, the appeal procedure shall be completed within three months of the original decision to expel ..."[1558]

674. Moreover, the Parliamentary Assembly of the Council of Europe considered that the right to a review should also apply to illegal aliens:

> "An alien without a valid residence permit may be removed from the territory of a member state only on specified legal grounds which are other than political or religious. He shall have the right and the possibility of appealing to an independent appeal authority before being removed. It should be studied if also, or alternatively, he shall have the right to bring his case before a judge. He shall be informed of his rights. If he applies to a court or to a high administrative authority, no removal may take place as long as the case is pending;

[1557] African Commission on Human and Peoples' Rights, Communication No. 212/98, Amnesty International v. Zambia, *Twelfth Annual Activity Report*, 1998-1999.

[1558] Council of Europe, Parliamentary Assembly, Recommendation 1624 (2003): Common policy on migration and asylum, 30 September 2003, para. 9.

> "A person holding a valid residence permit may only be expelled from the territory of a member state in pursuance of a final court order."[1559]

675. The right to challenge an expulsion has also been stressed by Special Rapporteur Davis Weissbrodt with respect to aliens suspected of terrorism:

> "Non-citizens suspected of terrorism should not be expelled without allowing them a legal opportunity to challenge their expulsion".[1560]

676. The Committee set up to examine the representation alleging non-observance by Ethiopia of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Termination of Employment Convention, 1982 (No. 158) pointed out that Ethiopia had denied some workers expelled the right to appeal to an independent body:

> "Turning to the issue of the right of appeal provided for in Article 4, the Committee notes that the existence of a right of appeal, while constituting a necessary condition for the application of the exception to the principle of the Convention, is not sufficient in itself. There must be an appeals body that is separate from the administrative or governmental authority and which offers a guarantee of objectivity and independence. This body must be competent to hear the reasons for the measures taken against the person in question and to afford him or her the opportunity to present his or her case in full. Noting the Government's statement that the deportees had the right to appeal to the Review Body of the Immigration Department, the Committee points out that this body forms part of the governmental authority. The Committee further notes that, while the Government of Ethiopia indicated that at least some of the individuals concerned appealed the deportation orders, no information was provided regarding the occurrence of the proceedings themselves or the outcomes. Accordingly, the Committee cannot conclude that the persons deported were provided the effective right of appeal within the meaning of Article 4 of the Convention."[1561]

677. Attention may also be drawn to the relevant legislation of the European Union dealing with the expulsion of Union citizens as well as third country nationals. Regarding Union citizens, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 provides:

> "Article 31: Procedural safeguards
>
> "1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

[1559] Council of Europe, note 607 above, paras. 9-10.

[1560] The rights of non-citizens, note 460 above, para. 28. [citation omitted]

[1561] International Labour Organization, note 1155 above, para. 37. [endnote omitted]

> "2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:
>
> - where the expulsion decision is based on a previous judicial decision; or
>
> - where the persons concerned have had previous access to judicial review; or
>
> - where the expulsion decision is based on imperative grounds of public security under Article 28(3).
>
> "3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.
>
> "4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory."[1562]

678. Concerning third country nationals, mention can be made of Council Directive 2001/40/EC of 28 May 2001, whose article 4 provides:

> "The Member States shall ensure that the third country national concerned may, in accordance with the enforcing Member State's legislation, bring proceedings for a remedy against any measure referred to in Article 1 (2) [expulsion decision]"[1563]

as well as Council Directive 2003/109/EC of 25 November 2003, whose article 12, paragraph 4 provides:

> "4. Where an expulsion decision has been adopted, a judicial redress procedure shall be available to the long-term resident in the Member State concerned."[1564]

[1562] Corrigendum to Directive 2004/38/EC, note 745 above.

[1563] Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, *Official Journal L 149*, 2 June 2001, pp. 34-36, article 4.

[1564] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, *Official Journal L 16*, pp. 44-53.

679. As early as in 1892, the Institut de Droit international pointed out, with respect to the expulsion of aliens, the desirability of a review procedure enabling the individual to appeal to an independent authority which should be competent to examine the legality of the expulsion. However, the Institut was of the view that an expulsion may be carried out provisionally notwithstanding an appeal and that no appeal needs to be granted to "aliens who, in times of war or when war is imminent, imperil the security of the State by their conduct" (article 28, paragraph 10 of the rules adopted by the Institut):

> "Any individual whose expulsion is ordered has the right, if he or she claims to be a national or asserts that the expulsion contravenes a law or an international agreement that prohibits or expressly rules out expulsion, to appeal to a superior judicial or administrative court that rules in full independence from the government. Expulsion may, however, be effected provisionally, notwithstanding the appeal."[1565]
>
> "It is desirable that for ordinary expulsions, even aside from cases where under the law the person is declared exempt from expulsion, the expellee be able to appeal to a superior judicial or administrative court independent of the government."[1566]
>
> "The court shall rule only on the legality of the expulsion; it shall not assess either the person's conduct or the circumstances which seemed to the government to make expulsion necessary".[1567]
>
> "In the case of article 28, paragraph 10, there shall be no appeal."[1568]
>
> "Expulsion may be carried out provisionally, notwithstanding the appeal."[1569]

[1565] *Règles internationales*, note 56 above, article 21 [French original].

[1566] Ibid., article 34 [French original].

[1567] Ibid., article 35 [French original].

[1568] Ibid., article 36 [French original].

[1569] Ibid., article 37 [French original].

680. National laws differ as to whether[1570] or not[1571] they permit review of a decision on expulsion. A State may likewise (1) allow a motion to reopen or reconsider the relevant decision,[1572] including with respect to a new claim of protected status;[1573] (2) expressly grant the Government a right of appeal;[1574] (3) prohibit an appeal or certain forms of relief from deportation when the expelled alien threatens the State's *ordre public* or national security, or is allegedly involved in terrorism;[1575] (4) allow certain appeals to be raised only by aliens located outside the State;[1576] (5) confer a right of

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[1570] Argentina, 2004 Act, articles 74-75, 77-81, 84-85; Australia, 1958 Act, article 202(2)(c), (3)(c); Belarus, 1999 Council Decision, article 20, 1998 Law, articles 15, 29; Bosnia and Herzegovina, 2003 Law, articles 8(2), 21(2), 62(5), 76(6); Canada, 2001 Act, articles 63(2)-(3), (5), 64, 66-67, 72-74; Chile, 1975 Decree, article 90; Czech Republic, 1999 Act, section 172; France, Code, articles L213-2, L513-3, L514-1(2), L524-2, L524-4, L555-3; Greece, 2001 Law, article 44(5); Guatemala, 1986 Decree-Law, article 131; Hungary, 2001 Act, article 42(1); Iran, 1931 Act, article 12, 1973 Regulation, article 16; Italy, 2005 Law, article 3(4), (5), 1998 Decree-Law No. 286, articles 13(3), (*5bis*), (8), (11), 13*bis*(1), (4), 14(6), 1998 Law No. 40, article 11(8)-(11), 1996 Decree-Law, article 7(1), (3); Japan, 1951 Order, articles 10(9)-(10), 11(1), 48(8)-(9), 49; Republic of Korea, 1992 Act, article 60(1), 1993 Decree, articles 74, 75(1); Lithuania, 2004 Law, article 136; Malaysia, 1959-1963 Act, articles 9(8), 33(2); Nigeria, 1963 Act, article 21(2); Panama, 1960 Decree-Law, article 86(1)-(2); Portugal, 1998 Decree-Law, articles 22(2), 23, 121; South Africa, 2002 Act, article 8(1)-(2); Spain, 2000 Law, article 26(2); Sweden, 1989 Act, sections 7.1-8, 7.11-18; Switzerland, 1949 Regulation, article 20(2), 1931 Federal Law, article 20; and United States, INA, sections 210(e)(3), 235(b)(3), 238(a)(3)(A), (b)(3), (c)(3), 242(a)(1), (5), (b)(9), (c)-(g), 505. Such a right may be conferred specifically when: (1) the alien allegedly poses a national security threat (Australia, 1958 Act, article 202(2)(c), (3)(c); Italy, 2005 Law, article 3(4), (5); and United States, INA, section 505); (2) the decision concerns the alien's claimed protected status (Bosnia and Herzegovina, 2003 Law, article 76(6); and Sweden, 1989 Act, sections 7.4-5); or (3) the appealed decision is a denial of the expelled alien's request to re-enter the State (Belarus, 1998 Law, article 29; and France, Code, article L524-2).

[1571] Bosnia and Herzegovina, 2003 Law, articles 28(2), 44(1), 49(3), 71(6), 78(1), 84(2); Canada, 2001 Act, article 64; Malaysia, 1959-1963 Act, article 33(2); Nigeria, 1963 Act, article 30(2); and United States, INA, section 242(a)(2)-(3). Such a lack of recourse may be specifically established with respect to decisions on protected status or on humanitarian permit grants (Bosnia and Herzegovina, 2003 Law, articles 49(3), 78(1), 84(2)). It may likewise be established when certain grounds exist for the alien's expulsion or refusal of entry (Canada, 2001 Act, article 64; and Malaysia, 1959-1963 Act, article 33(2)).

[1572] Brazil, 1980 Law, article 71; Guatemala, 1986 Decree-Law, article 130; and United States, INA, section 240(b)(5)(C)-(D), (c)(6)-(7).

[1573] United States, INA, section 240(c)(6)-(7).

[1574] Canada, 2001 Act, articles 63(4), 70(1)-(2), 73; Switzerland, 1931 Federal Law, article 20(2); and United States, INA, sections 235(b)(3), 238(c)(3)(A)(i), 505(c). Such a right may be specifically granted with respect to claims of protected status (Canada, 2001 Act, article 73), or to actions concerning aliens alleged to be involved in terrorism (United States, INA, section 505(c)(1)).

[1575] Canada, 2001 Act, article 64(1); and United States, INA, sections 242(a)(1)(B)(ii), 504(k).

[1576] Argentina, 2004 Act, article 35; France, Code, article. L524-3. Such an appeal may include a request that the prohibition on the alien's re-entry be lifted. (France, Code, articles L541-2, L541-4).

appeal specifically on permanent residents[1577] or protected persons;[1578] or (6) reserve review to a domestic court, including with respect to claims raised under the terms of international conventions.[1579]

681. A State may require that a decision inform the alien about any available rights of appeal.[1580] The period for seeking review may begin when the expulsion decision is taken,[1581] or when notice or the decision's reasoning is provided.[1582] A State may[1583] or may not[1584] stay execution of the decision during the pendency of the appeal. A State may grant a stay (1) when the alien has been or is likely to be expelled;[1585] or (2) upon the request of a relevant international body unless there are extraordinary reasons not to issue the stay.[1586] A State may imprison an official for deporting an alien unless a final and binding decision has been taken to expel the alien.[1587] A State may establish that if no review decision has been taken by a given deadline, the appeal may be considered to have been tacitly rejected.[1588]

[1577] Canada, 2001 Act, article 63(2).

[1578] Ibid., article 63(3).

[1579] United States, INA, section 242(a)(4)-(5).

[1580] Bosnia and Herzegovina, 2003 Law, articles 8(2), 76(6); France, Code, article L213-2; Japan, 1951 Order, articles 10(9), 48(8); Portugal, 1998 Decree-Law, articles 22(2), 120(2); Republic of Korea, 1993 Decree, article 74; Spain, 2000 Law, articles 26(2), 57(9); and Switzerland, 1931 Federal Law, article 19(2). Such a requirement may be imposed specifically with respect to claims of protected status (Bosnia and Herzegovina, 2003 Law, article 76(6)).

[1581] Argentina, 2004 Act, article 35; and United States, INA, sections 238(b)(3), 240(b)(1).

[1582] Argentina, 2004 Act, articles 75, 84; Belarus, 1998 Law, article 15; Bosnia and Herzegovina, 2003 Law, articles 21(2), 43(1), 62(5), 70(1); Canada, 2001 Act, articles 72(2)(b), 169(f); Hungary, 2001 Act, article 42(1); Iran, 1973 Regulation, article 16; and Panama, 1960 Decree-Law, article 86.

[1583] Argentina, 2004 Act, article 82; Belarus, 1999 Council Decision, article 20, 1998 Law, article 31; Bosnia and Herzegovina, 2003 Law, articles 43(2), 44(2), 49(4), 58(1), 78(2), 84(3)-(4); Canada, 2001 Act, articles 49(1), 68, 70(1)-(2); Chile, 1975 Decree, article 90; France, Code, article L513-3; Iran, 1931 Act, article 12; Italy, 1998 Decree-Law No. 286, article 16(7); Japan, 1951 Order, articles 11(1), 49(1); Malaysia, 1959-1963 Act, article 33; Nigeria, 1963 Act, article 21(2); Panama, 1960 Decree-Law, article 87; Republic of Korea, 1992 Act, article 60(1); South Africa, 2002 Act, article 8(2)(b); Sweden, 1989 Act, sections 8.10, 11.4; and United States, INA, sections 101(a)(47)(B), 242(f). A stay may be entered subject to conditions (Canada, 2001 Act, article 68; France, Code, article L513-3; Iran, 1931 Act, article 12; and United States, INA, section 242(f)). A refusal of the requested stay may entail the dismissal of the related appeal (Canada, 2001 Act, article 69(1)).

[1584] Bosnia and Herzegovina, 2003 Law, articles 21(3), 62(6), 70(2); Czech Republic, 1999 Act, section 172(4); Italy, 2005 Law, article 3(4)-(4*bis*), 1998 Decree-Law No. 286, article 13(5*bis*); South Africa, 2002 Act, article 8(2)(a); and Sweden, 1989 Act, sections 8.7-9. Such a prohibition may be imposed specifically when the alien is allegedly involved in terrorism (Italy, 2005 Law, article 3(4)-(4*bis*)).

[1585] Australia, 1958 Act, articles 151, 153.

[1586] Sweden, 1989 Act, section 8.10a.

[1587] Paraguay, 1996 Law, articles 108, 110.

[1588] Argentina, 2004 Act, article 76.

682. The scope of review in relevant situations may be limited to (1) due process and reasonableness;[1589] (2) whether the challenged decision is wrong in law, fact or both;[1590] (3) whether natural justice has been observed;[1591] (4) the objection's reasonability[1592] or well-groundedness;[1593] or (5) abuse of discretion or whether the decision's conclusions are manifestly contrary to law or the clear and convincing facts in the record.[1594] When the alien is alleged to be involved in terrorism, a court may conduct a *de novo* review of the legal issues and apply a "clearly erroneous" standard in reviewing the facts.[1595] A State may limit the scope of review if the alien has already departed the State.[1596] A State may limit the reviewing body's right to apply humanitarian considerations unless the alien is specifically eligible for such treatment.[1597] Furthermore, a State may expressly allow an expulsion decision to remain in force if no new circumstances are thereafter presented during the alien's prohibition from the State's territory.[1598]

683. Numerous national courts have recognized the right to a review procedure for a decision on expulsion.[1599] The Supreme Court of the United States, in the case of *Immigration and Naturalization*

[1589] Ibid., article 89.

[1590] Canada, 2001 Act, article 67(1)(a).

[1591] Ibid., articles 67(1)(b), 71.

[1592] Japan, 1951 Order, articles 11(3), 49(3).

[1593] Republic of Korea, 1992 Act, article 60(3).

[1594] United States, INA, sections 210(e)(3)(B), 240(b)(4)(C)-(D).

[1595] Ibid., section 505(a)(3), (c)(4)(C)-(D).

[1596] Austria, 2005 Act, article 3.57.

[1597] Canada, 2001 Act, articles 65, 67(1)(c).

[1598] Poland, 2003 Act No. 1775, article 21(1)(7).

[1599] *Secretary of State for the Home Department v. Rehman,* Court of Appeal of England, 23 May 2000, *International Law Reports*, volume 124, E. Lauterpacht, C. J. Greenwood, A. G. Oppenheimer (eds.), pp. 511-550; *Regina v. Spalding,* Canada, British Columbia Court of Appeal, 6 July 1955, *International Law Reports*, 1955, H. Lauterpacht (ed.), pp. 510-511; *Masella v. Langlais,* Canada, Supreme Court, 7 March 1955, *International Law Reports*, 1955, H. Lauterpacht (ed.), pp. 490-497. "All individuals, including aliens and stateless persons, must be given an opportunity to defend their rights and freedoms through the constitutional justice system, if their rights and freedoms guaranteed by the Constitution of the Russian Federation have been violated by a law. Consequently, the stateless person Yahya Dashti Gafur is entitled to appeal to the Constitutional Court of the Russian Federation." *Ruling No. 6*, note 239 above. "However, since the foreigner had the right of resort to the judicial power by habeas corpus, there existed a remedy against the possible abuse of the right of expulsion." *In re Everardo Diaz,* Brazil, Supreme Federal Tribunal, 8 November 1919, *Annual Digest of Public International Law Cases*, 1919-1922, Sir John Fischer Williams and H. Lauterpacht (eds.), Case No. 179, pp. 254-257, at p. 255. "That body is responsible, in particular, for taking decisions of expulsion (Section 3 of the Law) and its decisions are subject to appeal to the *Conseil d'État* ... " *Dame X v. Conseil d'État du Canton de Genève,* Switzerland, Federal Tribunal, 2 April 1987, *International Law Reports*, volume 102, E.

Service v. St. Cyr, held that the right of an alien to appeal an expulsion order was protected by the United States Constitution, and that a deportation Statute should not be interpreted to deny such a right. The Court stated:

> "Article I, §9, cl. 2, of the Constitution provides: 'The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.' Because of that Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.' *Heikkila* v. *Barber*, 345 U. S. 229, 235 (1953). [...] It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the INS's submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise. ... Moreover, to conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law."[1600]

684. Some national courts have noted, however, that the scope of such review is often very limited.[1601] For instance, in the United Kingdom:

Lauterpacht, C. J. Greenwood, A. G. Oppenheimer (eds.), pp. 195-197, at p. 197; "It is therefore incumbent upon the Council to exercise this review over decrees approving resolutions of the National Police Department expelling foreigners for the purpose of ascertaining whether the requisite procedure of enquiry and information has been complied with." *In re Watemberg*, Colombia, Council of State, 13 December 1937, *Annual Digest and Reports of Public International Law Cases*, 1938-1940, H. Lauterpacht (ed.), Case No. 137, pp. 384-386, at p. 386. "The Conseil d'Etat is not empowered to judge whether the Minister of Justice was right in considering the presence of a particular alien to be harmful for the safety of the country. At the same time, there would be abuse of powers if the expulsion were decided upon in the absence of any circumstances capable of justifying it, *i.e.*, on the basis of non-existent facts or on the basis of facts which cannot be considered in law as valid reasons for expulsion." *Cazier v. Belgian State (Minister of Justice)*, Conseil d'État, 13 July 1953, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 335-336. "According to the settled and undisturbed course of decisions, express statutory provisions and the views of writers, the Court has no jurisdiction to pass on the opportuneness, suitability, or justice of the expulsion." *In re Manoel Osorio*, Supreme Court of Brazil, 126 *Revista de Direito* 72, 27 June 1936 (per ILR, Note to *In re Bernardo Groisman*, Argentina, Federal Supreme Court, 22 July 1935, *Annual Digest and Reports of Public International Law Cases*, 1935-1937, H. Lauterpacht (ed.), Case No. 163, pp. 345-347, at p. 346; "Expulsion of foreigners is an act of sovereignty of the State. It is an act whose propriety must, as a rule, be determined by the Executive. The judicial power has merely to ascertain in each case whether the action of the Executive conforms with the law of expulsion in force at the time." *In re Carnevale*, Brazil, Supreme Court, 19 July 1939, *Annual Digest and Reports of Public International Law Cases*, 1938-1940, H. Lauterpacht (ed.), Case No. 141, pp. 390-391, at p. 390.

[1600] *Immigration and Naturalization Service v. St. Cyr*, United States Supreme Court, 25 June 2001 [No. 00-767], 533 U.S. 289 (2001).

[1601] See, e.g., *Perregaux*, Conseil d'État, 13 May 1977, *International Law Reports*, volume 74, E. Lauterpacht, C.J. Greenwood (eds.), pp. 427-430, at p. 429 "Firstly the grounds contained in the decision are not wrong in law. Secondly it does not result from the procedure of inquiry that the discretion exercised by the Minister of the Interior in deciding that, as a whole, the activities and the behaviour of Berthier Perregaux constituted a threat to public order, was based on factual inaccuracies or involved an obvious error."

> "34. The adjudicator hearing the appeal is required by section 19(1) to allow the appeal if he considers that the decision was 'not in accordance with the law or with any immigration rules applicable to the case' or, where the decision involved the exercise of a discretion by the Secretary of State, 'that the discretion should have been exercised differently'. Otherwise, the appeals must be dismissed."[1602]

685. The scope of review is even more limited in the United States, where the Supreme Court clarified:

> "Other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive. However, they did review the Executive's legal determinations. ... In case after case, courts answered questions of law in habeas corpus proceedings brought by aliens challenging Executive interpretations of the immigration laws."[1603]

686. On the other hand, in 1941, the Federal Court of Cassation of Venezuela ruled that:

> "The right of expulsion of undesirable foreigners as well as of exclusion or expulsion of ineligible aliens, being based on the free exercise by the State of its sovereignty, it is natural that there should be no right of appeal on any ground against it. ... But by a Venezuelan provision, as a safeguard against possible error committed in a decree of expulsion with regard to the nationality of the person to be expelled, the law permits the allegation that he is a Venezuelan. It is easy to see that such allegation does not affect in any way the actual right of expulsion, which is a categorical manifestation of national sovereignty. It is, indeed, an implicit confirmation of the essential unimpeachability of the decree for the expulsion of pernicious foreigners."[1604]

687. In some national systems, the scope of judicial review over expulsion decisions is further limited when the decision is based on grounds of national security or public order.[1605] However, in the

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[1602] *Secretary of State for the Home Department v. Rehman,* Court of Appeal of England, 23 May 2000, *International Law Reports*, volume 124, E. Lauterpacht, C.J. Greenwood, A.G. Oppenheimer (eds.), pp. 511-550, at p. 540 (Lord Hoffman).

[1603] *Immigration and Naturalization Service v. St. Cyr,* United States Supreme Court, 25 June 2001 [No. 00-767], 533 U. S. 289 (2001).

[1604] *In re Krupnova,* Venezuela, Federal Court of Cassation, 27 June 1941, *Annual Digest and Reports of Public International Law Cases*, 1941-1942, H. Lauterpacht (ed.), Case No. 92, p. 309.

[1605] See, e.g., *Secretary of State for the Home Department v. Rehman,* Court of Appeal of England, 23 May 2000, *International Law Reports*, volume 124, E. Lauterpacht, C.J. Greenwood, A.G. Oppenheimer (eds.), pp. 511-550. "On the other hand, § 4 provided as follows: 'This procedure shall not be applicable if the expulsion order is based on reasons connected with public order or national security, of which the Minister for the Interior or *préfets* of frontier *départements* shall be the sole judges'." *In re Salon,* France, Conseil d'État, 3 April 1940, *Annual Digest and Reports of Public International Law Cases*, 1919-1942 (Supplementary Volume), H. Lauterpacht (ed.), Case No. 105, pp. 198-199.

United Kingdom, an exclusion of the right to appeal when an expulsion was based on national security was removed in response to the *Chahal* ruling of the European Court of Human Rights.[1606]

(b) Determination of the State of destination

688. The alien may have a separate right of appeal with respect to the determination of the State of destination as a result of expulsion in contrast to exclusion under national law.

> "In exclusion proceedings, States generally assume a greater latitude in regard to the destination to which the individual is to be removed, and it is not uncommon to secure his removal to the port of embarkation. The wide choice available to State authorities and accepted in practice must be reviewed against the fact that the excluded alien will only rarely be entitled to appeal against the proposed destination or to arrange for his own departure. Once he has passed the frontier, however, State practice frequently allows him to benefit from certain procedural guarantees. Thus, he may be able to appeal, not only against the expulsion itself, but also against the proposed destination, and he may be given the opportunity of securing entry to another country of his choice. Of course, in the final analysis, if no other State is willing to receive him, then the only State to which the alien can lawfully be removed is his State of nationality or citizenship. If he is unable to secure admission elsewhere, his appeal against removal will commonly fail." [1607]

689. However, the existence of such a right under international is unclear.

10. National security or public order exception

690. The procedural rights of an alien with respect to expulsion may be subject to exceptions based on grounds of national security or public order under the relevant treaty law or national legislation.[1608]

[1606] Ibid., pp. 531-532. "Despite this prohibition there was set up an advisory procedure to promote a consideration of the Secretary of State's decision under that Act. This however was held by the European Court of Human Rights in *Chahal* v. *United Kingdom* (1996) 23 EHRR 413 not to provide an effective remedy within section 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmnd 8969). […] The exclusion of the right of appeal if the decision to deport was on the ground that deportation was conducive to the public good on the basis that it was in the interests of national security or of the relations between the United Kingdom and any other country or for any other reasons of a political nature was thus removed."

[1607] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 223-224 (citations omitted) (see *R.* v. *Governor of Brixton Prison, ex parte Sliwa* [1952] 1 All E.R. 187).

[1608] "Under Article 13 of the ICCPR and Protocol 7 of the European Court Of Human Rights, aliens lawfully present in a state are entitled to procedural protections prior to being expelled, including review by a competent authority and the opportunity to submit reasons against the expulsion. These procedural rights, however, may be denied if national security so requires. Although the Human Rights Committee has repeatedly indicated that it will not 'test a sovereign State's evaluation of an alien's security rating,' it has rejected national security

691. This possibility is explicitly recognized in the International Covenant on Civil and Political Rights for "compelling reasons of national security":

> "An alien lawfully in the territory of a State Party [to the present Covenant] 'may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority'."[1609] [Emphasis added.]

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justifications for summary expulsion where the state failed to make any showing as to why extreme measures were required. The European Court of Human Rights has offered little guidance on the national security exception in this context; scholars, however, have urged that an objective showing of the security need should be required." David Fisher et al., note 130 above, p. 117 (quoting *V.M.R.B.* v. *Canada,* Comm. No. 236/1987, U.N. Doc. CCPR/C/33/236/1987 (1987) at 6.3; *J.R.C.* v. *Costa Rica* 296/1988 at 8.4) and n. 230 ("In *Giry* v. *Dominican Republic,* Comm. No. 193/1985, 95*ILR* 321 (1990), the Dominican Republic intercepted the author at the airport as he attempted to buy a ticket for Saint-Bartholemy and unceremoniously forced him onto a flight to Puerto Rico where he was apprehended by American agents on drug charges. The Committee dismissed the Dominican Republic's argument that summary expulsion was necessary for security reasons, noting that 'it was the author's very intention to leave the Dominican Republic at his own volition for another destination.' Id. at 5.5. Similarly, in *Hammel* v. *Madagascar,* Comm. No. 155/1983, 3 April 1987, U.N. Doc. Supp. No. 40 (A/42/40), the Committee concluded that the state had violated Art. 13 in expelling an attorney apparently because he had represented clients in prior cases before the Human Rights Committee, and that the state had failed to make any showing of security requiring summary expulsion.") (other citations omitted).

[1609] In the *Eric Hammel v. Madagascar* case (Communication No. 155/1983, 3 April 1987, U.N. Doc. Supp. No. 40 (A/42/40), para. 19(2)), the Committee considered that there were no "compelling reasons of national security" to deprive the claimant of his right to an effective remedy to challenge his expulsion. "As mentioned above, the procedural guarantees of Art. 13 are – except for the requirement of a decision reached in accordance with law - subject to the proviso that they are not opposed by 'compelling reasons of national security' ('*des raisons impérieuses de sécurite nationale*'). This provision was adopted literally from Art. 32(2) of the Refugee Convention. Nevertheless, it must be interpreted in the overall context of the Covenant. A State can rely on national security only in serious cases of political or military threats to the entire nation. Moreover, the formulation 'compelling reasons' indicates that this exceptional provision has an especially narrow scope of application. Dangerous spies, agents or terrorists may be expelled with reference to this proviso even without a hearing, an appeal or representation. However, this decision must also be made in accordance with law. In the *Hammel* case, the Committee pointed out that Madagascar did not submit any compelling reasons of national security to justify the expulsion of the French attorney in contravention of the Covenant. In the *Giry* case, the Government of the Dominican Republic explicitly invoked this limitation clause by stating that persons internationally sought on charges of drug-trafficking constituted a national security danger which would justify a summary expulsion. The Committee, however, rejected this argument and noted that, 'while the State party has specifically invoked the exception based on reasons of national security for the decision to force him to board a plane destined for the jurisdiction of the United States of America, it was the author's very intention to leave the Dominican Republic at his own volition for another destination.' One may, therefore, conclude that the Committee applies comparably strict standards for the interpretation of the 'compelling reasons of national security'." Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Kehl am Rhein, N.P. Engel Publisher, 1993, p. 232 (citing *Hammel* case, No. 155/1983, § 19.2; and *Giry* case, No. 193/1985, §§ 4.3 and 5.5.) and n. 48 ("Art. 1 of the 7th AP to the European Court Of Human Rights, which is modelled on Art. 13, did not, on the other hand, adopt 'compelling reasons', adding instead to the national security restriction the

692. The same exception is provided for in article 7 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144.[1610]

693. Also worth mentioning is article 1, paragraph 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. When an expulsion "is necessary in the interests of public order or is grounded on reasons of national security", this provision permits to carry out such an expulsion before allowing the alien to exercise the procedural rights to which it would normally be entitled.

> "Article 1 – Procedural safeguards relating to expulsion of aliens
>
> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> a. to submit reasons against his expulsion,
>
> b. to have his case reviewed, and
>
> c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> "2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, *when such expulsion is necessary in the interests of public order or is grounded on reasons of national security*." [Emphasis added.]

694. Attention may also be drawn to article 3, paragraph 2 of the European Convention on Establishment, which refers in this context to "imperative considerations of national security":

> "*Except where imperative considerations of national security otherwise require*, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority." [Emphasis added.]

695. Within the European Union, attention may be drawn to article 30, paragraph 2 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, which allows a State, in

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much farther-reaching ground 'public order'. Because this does not involve a prohibition of expulsion but rather only procedural guarantees, this limitation clause appears to be quite broad.") (other citations omitted) (italics added).

[1610] Resolution 40/144, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, 13 December 1985.

order to protect "the interests of State security", to dispense with the requirement to inform the alien expelled of the reasons for his or her expulsion.

> **"Article 30: Notification of decisions**
>
> **"2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, *unless this is contrary to the interests of State security.* […]" [Emphasis added.]**

696. Moreover, national security concerns may justify the holding of an *ex parte* or *in camera* proceeding.[1611]

[1611] "Immigration proceedings must comply with general principles of due process. The ICCPR devotes a specific article, Article 13, to expulsion proceedings … [T]he exception for 'compelling reasons' of national security might justify *ex parte* or *in camera* proceedings in terrorist cases." Alexander T. Aleinikoff, note 119 above, p. 19. "Even these limited guarantees may be overridden if there are 'compelling reasons of national security' – a provision which may make room for *ex parte in camera* procedures in terrorist cases." David A. Martin, "The Authority and Responsibility of States" *in* Alexander T. Aleinikoff and V. Chetail (eds.), Migration and International Legal Norms, The Hague, T.M.C. Asser Press, 2003, pp. 31-45, at p. 39.

IX. IMPLEMENTATION OF THE EXPULSION DECISION

A. Voluntary departure

697. The right of an alien to be given an opportunity for voluntary departure before being subject to compulsory measures would appear to be unclear as a matter of international law. Nevertheless, an alien who has received notice of an expulsion order may have the right, privilege or opportunity to voluntarily leave the territory of the expelling State under national law.[1612]

> "Deportation … is the means by which a State rids itself of an undesired alien. Its purpose is achieved as soon as the alien has departed from its territory; the ultimate destination of a deportee is of no significance in this respect. It would follow, therefore, that no interests of the deporting State would be affected were the deportee permitted to leave voluntarily for a destination of his own choice. The laws and jurisprudence of many countries reflect this view. As the Federal Supreme Court of Brazil once put it, 'the interest of the State is to *get* rid of the alien and not to restrain his liberty of action and movement after his leaving'."[1613]

[1612] "Nevertheless a discretion commonly rests with national immigration authorities to permit the alien to leave voluntarily or to deport him to a specific destination. That a discretion must exist to specify a particular destination is dictated by practical necessity." Ivan Anthony Shearer, *Extradition in International Law*, Manchester, University Press, 1971, p. 77 (citations omitted) (referring to *United States ex rel. Frangoulis v. Shaughnessy*, 210 F. 2nd 592 (2nd Cir. 1954); *R. v. Governor of Brixton ex parte Sliwa* [1952] 1 K.B. 169 (Ct. App.); *In re Guerreiro*, 18 *Int'l L. Rep.* 315 (Sup. Ct. Argentina, 1951)). "Although the fact of deportability must be established by clear, unequivocal, and convincing evidence, it will be seen that the powers of the Executive are less closely confined where the alien applies for discretionary relief, such as suspension of deportation, adjustment of status to that of permanent resident, or voluntary departure. […] If the alien admits that he is liable to deportation, then in certain circumstances he may be allowed the privilege of voluntary departure. 8 U.S.C. s. 1251(b); s. 1254(e). The discretion to permit voluntary departure applies in all cases other than those where there is reason to believe that the alien is deportable under s. 1251(a)(4), (5), (6), (7), (11), (12), (14), (15), (16), (17), (18), i.e. generally, as a subversive, criminal, prostitute, drugs offender, or one involved in violation of the aliens registration requirements. The Attorney General may authorize the payment of removal expenses if this is in the best interests of the country. In the case of *Brea-Garcia* v. *INS* 531 F.2d 693 (1976) voluntary departure was denied by reason of the applicant's adultery, which fact indicated that he was 'not of good moral character'." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 242, 267 and n. 4 (describing United States practice). "This study also takes into consideration those cases in which, in accordance with the existing national laws and regulations, the departure of undesirable immigrants is enforced without application of the regular expulsion procedure, i.e., when aliens against whom an expulsion order is envisaged or made are allowed to leave the country voluntarily, or when aliens are, through administrative decisions, excluded from the country (without being formally expelled)…" United Nations, "Study on Expulsion of Immigrants", Secretariat, 10 August 1955, pp. 1-77. (ST/SOA.22 and Corr.2 (replaces Corr.1)), para. 5.

[1613] Ivan Anthony Shearer, *Extradition in International Law*, Manchester, University Press, 1971, p. 76 (quoting *In re Esposito* [1933-4] *Ann. Dig.* 332) (paragraph indentation omitted).

698. Several national laws allow the alien expelled to leave voluntarily the territory of the State. A State may recognize voluntary departure as a valid procedure for deportation,[1614] even after expulsion proceedings have commenced.[1615] A State may allow the voluntarily departing alien to choose a State of destination.[1616] A State may remove or escort to the border (1) an alien who requests or agrees to depart voluntarily;[1617] or (2) a family member who wishes to depart with the expelled alien.[1618] A State may also prohibit the voluntarily departing alien's re-entry for a set period[1619] or permanently.[1620]

699. A State may establish a period within which voluntary departure must occur,[1621] or recognize that such a deadline may be set.[1622] A State may impose penalties such as a fine, imprisonment or prohibition on re-entry on an alien who does not voluntarily depart under the conditions imposed by the State.[1623]

[1614] Austria, 2005 Act, article 2.10(4); Belarus, 1999 Council Decision, article 4, 1993 Law, article 26; Bosnia and Herzegovina, 2003 Law, articles 56(4), 63(4); Brazil, 1981 Decree, article 98, 1980 Law, article 56; Canada, 2001 Act, article 48(2); Chile, 1975 Decree, article 67; China, 1986 Law, article 30, 1986 Rules, article 15, 2003 Provisions, article 189, 1992 Provisions, article I(iii), 1987 Note, article 5; Croatia, 2003 Law, article 56; Guatemala, 1999 Regulation, article 98; Hungary, 2001 Act, article 46(1)(b); Iran, 1931 Act, article 11; Italy, 1998 Decree-Law No. 286, articles 13(5), 14(*5bis*), 1998 Law No. 40, article 11(6), 1996 Decree-Law, article 7(3); Japan, 1951 Order, articles 10(9), 11(6), (8), 24-2, 52(4), 55-3(1), 55-5; Kenya, 1967 Act, article 8(4); Lithuania, 2004 Law, article 129(1); Nigeria, 1963 Act, article 27(2); Panama, 1960 Decree-Law, article 58; Paraguay, 1996 Law, article 39; Poland, 2003 Act No. 1775, article 95(1); Portugal, 1998 Decree-Law, articles 100(1)-(2), 123(1), 126, 126A; Republic of Korea, 1992 Act, articles 67-68, 1993 Decree, article 81; Russian Federation, 2002 Law No. 115-FZ, article 31(1)-(2); Sweden, 1989 Act, section 8.12; Switzerland, 1949 Regulation, articles 3(3), 16(8), 17(1); United Kingdom, 1971 Act, section 5(1); and United States, INA, sections 240B, 241(a)(1)(C), (3).

[1615] Belarus, 1998 Law, article 32; and Portugal, 1998 Decree-Law, article 126(1).

[1616] Belarus, 1998 Law, article 32; and United States, INA, section 250.

[1617] Australia, 1958 Act, articles 181(1), 198(1), 199, 205; Portugal, 1998 Decree-Law, article 126(1); and United States, INA, section 250.

[1618] Australia, 1958 Act, articles 199, 205.

[1619] Belarus, 1998 Law, article 32; and Portugal, 1998 Decree-Law, articles 25(1)(f)-(g), 126(2)-(3), 126A(2)-(4).

[1620] Malaysia, 1959-1963 Act, article 46(3)-(4); and United States, INA, section 250.

[1621] Bosnia and Herzegovina, 2003 Law, article 56(4); Brazil, 1981 Decree, article 98, 1980 Law, articles 56, 64(b); Chile, 1975 Decree, article 67; Italy, 1998 Decree-Law No. 286, articles 13(5), 14(*5bis*), 1998 Law No. 40, article 11(6), 1996 Decree-Law, article 7(3); Japan, 1951 Order, article 55-3(1); Panama, 1960 Decree-Law, article 58; Portugal, 1998 Decree-Law, articles 100(1)-(2), 123(1); Republic of Korea, 1992 Act, article 67(3); Russian Federation, 2002 Law No. 115-FZ, article 31(1)-(2); Sweden, 1989 Act, section 8.12; and United States, INA, section 240B(a)(2), (b)(2).

[1622] Belarus, 1999 Council Decision, article 15, 1993 Law, article 26; China, 1986 Law, article 30, 1987 Note, article 5; Croatia, 2003 Law, article 52; Guatemala, 1999 Regulation, article 98; Iran, 1931 Act, article 11; Japan, 1951 Order, article 24(5)-2, (8); Kenya, 1967 Act, article 8(4); Paraguay, 1996 Law, article 39; Poland, 2003 Act No. 1775, article 95(1); and Switzerland, 1949 Regulation, article 16(8).

[1623] Bosnia and Herzegovina, 2003 Law, article 96(1)(c), (2); China, 2002 Circular, article iii, 1987 Note, article 5; Italy, 1998 Decree-Law No. 286, article 14(*5ter*)-(*5quinques*); and United States, INA, sections 240B(d), 243(a)-(b).

700. A State may restrict or prohibit the alien's voluntary departure when the alien (1) has evaded or threatens to evade departure from the State;[1624] or (2) has committed certain violations, has acted against or threatens the State's *ordre public* or national security, or has previously been expelled by the State.[1625]

701. A State may require the alien to pay the expenses of the voluntary departure,[1626] or itself pay such expenses.[1627]

B. Deportation

1. Rights of the alien

(a) Humane treatment

702. A deportation may be illegal due to the manner in which it is conducted.[1628] In particular, the expulsion of aliens should be carried out in conformity with international human rights law concerning the prohibition of torture or inhuman or degrading treatment.[1629] The requirement that

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[1624] Austria, 2005 Act, article 3.46(1)(3); and Belarus, 1999 Council Decision, article 15, 1993 Law, article 26.

[1625] Belarus, 1999 Council Decision, article 15, 1998 Law, article 32; Italy, 1998 Decree-Law No. 286, article 13(5), 1998 Law No. 40, article 11(6), 1996 Decree-Law, article 7(3); Japan, 1951 Order, article 24-2(2)-(4); and United States, INA, sections 240B(b)(1)(C), (c), 241(a)(5), 504(k)(4). Such a prohibition may be specifically imposed on an alien allegedly involved in terrorism (United States, INA, section 504(k)(4)).

[1626] Belarus, 1998 Law, article 32; Japan, 1951 Order, article 52(4); Republic of Korea, 1992 Act, article 68(1)(1), 1993 Decree, article 81; and United States, INA, sections 240B, 241(e)(3)(C).

[1627] Malaysia, 1959-1963 Act, article 46; Poland, 2003 Act No. 1776, article 68(3); United Kingdom, 1971 Act, section 5(6); and United States, INA, section 250. A State may pay the travel expenses incurred by the alien's voluntarily departing family and household (Malaysia, 1959-1963 Act, article 46; Poland, 2003 Act No. 1776, article 68(1)-(3); and United Kingdom, 1971 Act, section 5(6)).

[1628] "An otherwise lawful deportation order may be rendered illegal if it is carried out in an unjust or harsh manner. Physical force which would cause or would be likely to cause bodily harm or injury should not be used in executing the order." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 96. "'Every state is authorized, for reasons of public order, to expel foreigners who are temporarily residing in its territory. But when a state expels a foreigner without cause, and in an injurious manner, the state of which the foreigner is a citizen has the right to prefer a claim for this violation of international law.'" Richard Plender, "The Ugandan Crisis and the Right of Expulsion under International Law", *The Review: International Commission of Jurists*, No. 9, 1972, pp. 19-32, at p. 25 (quoting Calvo's *Dictionary of International Law*).

[1629] "Expulsion should not be carried out with hardship or violence or unnecessary harm to the alien expelled." Shigeru Oda, "Legal Status of Aliens", *in* Max Sørensen (dir.) *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, at p. 483. "Irrespective of the existence or non-existence of an unlimited right to expel foreigners, their ill-treatment, abrupt expulsion or expulsion in an offensive manner is a breach of the minimum standards of international law with which their home State may expect compliance. If a State chooses to exercise its sovereign discretion in contravention of this rule, it does not abuse its rights of sovereignty. It simply breaks a prohibitory rule by which its rights of exclusive jurisdiction are limited." Georg Schwarzenberger, "The Fundamental Principles of International Law", *Recueil des cours de l'Académie de droit international*, vol. 87, 1955-I, pp. 290-383, at pp. 309-310. (See also Georg Schwarzenberger, *International Law* aliens be not subjected to torture or to cruel, inhuman or degrading treatment is set forth in General Assembly resolution 40/144.[1630] This type of conduct in connection with the expulsion of an alien has been a common ground for complaint.[1631] This limitation on the right of expulsion has been recognized in diplomatic practice[1632] and by international tribunals.[1633]

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and Order, London, Stevens & Sons, 1971, pp. 89-90.) "An expulsion amply justified in principle is nevertheless delictual under international law if it is conducted without proper regard for the safety and well-being of the alien. Once again, this is so either because the expulsion would amount to an abuse of rights, or because it would amount to violation of the 'minimum standard'. The proposition is so clear that it scarcely needs justification ..." Richard Plender, "The Ugandan Crisis and the Right of Expulsion under International Law", *The Review: International Commission of Jurists,* No. 9, 1972, pp. 19-32, at pp. 24, 25-26. "[A] State, in executing an expulsion or deportation order, should act in accordance with standards upholding human rights and human dignity. These standards have a direct bearing on the power of a State to deport or expel an alien. ... [T]here are various other norms and principles relating to human rights and human dignity which are recognized in multilateral instruments and are accepted by the vast majority of nations. These principles include ... the right of an individual not to be subjected to inhuman or degrading treatment." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 95. *See* also Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* Cambridge, Grotius Publications Limited, 1987, p. 36.

[1630] Resolution 40/144, Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, 13 December 1985, article 6.

[1631] "The most numerous cases arise because of the unduly oppressive exercise of the power of expulsion. It is fundamental that the measure should be confined to its direct object, getting rid of the undesirable foreigner. All unnecessary harshness, therefore, is considered a justification for a claim. Even where an expulsion is admitted to be justifiable, it should be effected with as little injury to the individual and his property interests as is compatible with the safety and interests of the country which expels him." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1915, pp. 59-60. "While the right of exclusion or expulsion is discretionary, a harsh, arbitrary, or unnecessarily injurious manner of exercising the discretion often gives rise to dispute." B. O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal,* vol. 16, No. 1, 1975, pp. 47-92, at p. 85. "Calvo maintained that when a government expels a foreigner in a harsh, inconsiderate manner *('avec des formes blessantes')* the latter's State of nationality has a right to base a claim on the expulsion as a violation of international law." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, pp. 469-471 (quoting *Dictionnaire de droit international*). "[A] State engages international responsibility if it expels an alien ... in an unnecessarily injurious manner." Richard Plender, *International Migration Law,* Revised 2nd ed., Dordrecht, Martinus Nijhoff Publishers, 1988, p. 459.

[1632] "Diplomatic practice, too, demonstrates amply the principle that an expulsion contravenes international law if it is achieved without due regard for the alien's welfare." Richard Plender, "The Ugandan Crisis and the Right of Expulsion under International Law", *The Review: International Commission of Jurists,* No. 9, 1972, pp. 19-32, at pp. 24, 25-26. "Arbitrary expulsions ... under harsh or violent circumstances unnecessarily injurious to the person affected have given rise to diplomatic claims ..." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1915, p. 57. "Other instances have arisen in more recent years where the procedure applied in the course of expulsion has manifested a harsh treatment against which the United States has felt constrained to make emphatic protest." Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States,* vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 233 (citations omitted).

[1633] "The principle that an expulsion must be carried out in a manner least injurious to the person affected has been enunciated on several occasions by international tribunals. Thus, summary expulsions ... by which they

703. Annex 9 to the Convention on International Civil Aviation provides:

> "5.2.1 During the period when an inadmissible passenger or a person to be deported is under their custody, the state Officers concerned shall preserve the dignity of such persons and take no action likely to infringe such dignity."[1634]

704. There are several other instances of practice supporting the requirement that a deportation be carried out humanely and with due respect to the dignity of the individuals involved.

705. The existence of such a requirement was implicitly affirmed in the *Lacoste* case, although it was held that the claimant had not been subjected to harsh treatment:

> "Lacoste further claims damages for his arrest, imprisonment, harsh and cruel treatment, and expulsion from the country. […] The expulsion does not, however, appear to have been accompanied by harsh treatment, and at his request the claimant was allowed an extension of the term fixed for his leaving the country."[1635]

Similarly, in the *Boffolo Case*, the Umpire indicated in general terms that

> "[E]xpulsion […] must be accomplished in the manner least injurious to the person affected …"[1636]

706. In the *Maal Case*, the umpire stressed the sacred character of the human person and the requirement that an expulsion be accomplished without unnecessary indignity of hardship:

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were subjected to unnecessary indignities, harshness or oppression, have all been considered by international commissions as just grounds for awards." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 60 (citing *Maal (Netherlands) v. Venezuela*, Feb. 28, 1903, Ralston, 915; and *Boffolo (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 702; also referring to *Jaurett (U. S.) v. Venezuela*, Sen. Doc. 413, 60th Cong. 1st Bess., 20 *et seq.*, 559 *et seq.* (settled by agreement of Feb. 13, 1909, For. Rel., 1909, 629)). "Arbitrary expulsions … under harsh or violent circumstances unnecessarily injurious to the person affected have given rise to … awards by arbitral commissions." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 57. "Thus in cases concerning the expulsion of aliens, an international tribunal would normally accept as conclusive the reasons of a serious nature adduced by the State as justifying such action. It would, however, regard as unlawful measures of expulsion those which are … accompanied by unnecessary hardship." Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, Grotius Publications Limited, 1987, p. 133 (citations omitted).

[1634] Convention on International Civil Aviation, Chicago, 7 December 1944, Annex 9 (12th ed.), United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.

[1635] *Case Lacoste v. Mexico* (Mexican Commission), Award of 4 September 1875, in John Bassett Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party, vol. IV, pp. 3347-3348.

[1636] *Boffolo Case*, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 528-538, at p. 534 (Ralston, Umpire).

> "[H]ad the exclusion of the claimant been accomplished without unnecessary indignity or hardship to him the umpire would feel constraint to disallow the claim … From all the proof he came here as a gentleman and was entitled throughout his examination and deportation to be treated as a gentleman, and whether we have to consider him as a gentleman or simply as a man his rights to his own person and to his own undisturbed sensitivities is one of the first rights of freedom and one of the priceless privileges of liberty. The umpire has been told to regard the person of another as something to be held sacred, and that it could not be touched even in the lightest manner, in anger or without cause, against his consent, and if so done it is considered an assault for which damages must be given commensurate with the spirit and the character of the assault and the quality of the manhood represented in the individual thus assaulted."[1637]

707. The Parliamentary Assembly of the Council of Europe expressed its deep concern about incidents and ill-treatment occurring during deportations.[1638] Furthermore, it stressed the subsidiary character of forced expulsion and the need to respect safety and dignity in all circumstances.

> "7. The Assembly believes that forced expulsion should only be used as a last resort, that it should be reserved for persons who put up clear and continued resistance and that it can be avoided if genuine efforts are made to provide deportees with personal and supervised assistance in preparing for their departure.
>
> "8. The Assembly insists that the Council of Europe's fundamental values will be threatened if nothing is done to combat the present climate of hostility towards refugees, asylum seekers and immigrants, and to encourage respect for their safety and dignity in all circumstances"[1639]

708. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has also stressed that recourse to force when implementing an expulsion order should be limited to what is reasonably necessary, and provided details concerning the means and methods of deportation that should not be used. The Committee has also insisted on the need for the establishment of internal and external monitoring systems and for proper documentation of deportation.

> "The CPT recognises that it will often be a difficult task to enforce an expulsion order in respect of a foreign national who is determined to stay on a State's territory. Law enforcement officials may on occasion have to use force in order to effect such a removal. However, the force used should be no more than is reasonably necessary. It would, in particular, be entirely unacceptable for persons subject to an expulsion order to be physically assaulted as a form of persuasion to board a means of transport or as punishment for not

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[1637] *Maal Case*, Mixed Claims Commission Netherlands-Venezuela, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 730-733, at p. 732.

[1638] Council of Europe, Parliamentary Assembly, Recommendation 1547 (2002): Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, 22 January 2002, para. 6

[1639] Ibid., paras. 7-8.

having done so. Further, the Committee must emphasise that to gag a person is a highly dangerous measure."[1640]

The same Committee held that:

> "[I]t is entirely unacceptable for persons subject to a deportation order to be physically assaulted as a form of persuasion to board a means of transport or as a punishment for not having done so. The CPT welcomes the fact that this rule is reflected in many of the relevant instructions in the countries visited. For instance, some instructions which the CPT examined prohibit the use of means of restraint designed to punish the foreigner for resisting or which cause unnecessary pain.
>
> "[T]he force and the means of restraint used should be no more than is reasonably necessary. The CPT welcomes the fact that in some countries the use of force and means of restraint during deportation procedures is reviewed in detail, in the light of the principles of lawfulness, proportionality and appropriateness.
>
> "[…] The CPT has made it clear that the use of force and/or means of restraint capable of causing positional asphyxia should be avoided whenever possible and that any such use in exceptional circumstances must be the subject of guidelines designed to reduce to a minimum the risks to the health of the person concerned.
>
> "In addition to the avoidance of the risks of positional asphyxia referred to above, the CPT has systematically recommended an absolute ban on the use of means likely to obstruct the airways (nose and/or mouth) partially or wholly. […] It notes that this practice is now expressly prohibited in many States Parties and invites States which have not already done so to introduce binding provisions in this respect without further delay.
>
> "It is essential that, in the event of a flight emergency while the plane is airborne, the rescue of the person being deported is not impeded. Consequently, it must be possible to remove immediately any means restricting the freedom of movement of the deportee, upon an order from the crew.
>
> "[…] In the CPT's opinion, security considerations can never serve to justify escort staff wearing masks during deportation operations. This practice is highly undesirable, since it could make it very difficult to ascertain who is responsible in the event of allegations of ill-treatment.
>
> "The CPT also has very serious reservations about the use of incapacitating or irritant gases to bring recalcitrant detainees under control in order to remove them from their cells and transfer them to the aircraft.
>
> "[T]he importance of allowing immigration detainees to undergo a medical examination before the decision to deport them is implemented. This precaution is particularly necessary when the use of force and/or special measures is envisaged.

[1640] Council of Europe, note 1542 above, para. 36.

> "Operations involving the deportation of immigration detainees must be preceded by measures to help the persons concerned organise their return, particularly on the family, work and psychological fronts.
>
> "Similarly, all persons who have been the subject of an abortive deportation operation must undergo a medical examination as soon as they are returned to detention.
>
> "The importance of establishing internal and external monitoring systems in an area as sensitive as deportation operations by air cannot be overemphasised.
>
> "Deportation operations must be carefully documented.
>
> "[…] Further, the CPT wishes to stress the role to be played by external supervisory (including judicial) authorities, whether national or international, in the prevention of ill-treatment during deportation operations. These authorities should keep a close watch on all developments in this respect, with particular regard to the use of force and means of restraint and the protection of the fundamental rights of persons deported by air."[1641]

709. Respect for human dignity is also required by the legislation of the European Union concerning the expulsion or removal of a third country national. The Council Decision of 23 February 2004 indicates in its preamble:

> "This decision respects the fundamental rights and observes the principles reflected in particular in the Charter of Fundamental Rights of the European Union. In particular this Decision seeks to ensure full respect for human dignity in the event of expulsion and removal, as reflected in Articles 1, 18 and 19 of the Charter."[1642]

710. In its *Règles sur l'admission et l'expulsion des étrangers*, the Institut de Droit international enunciated the principle according to which

> "[d]eportation is not a punishment and must therefore be executed with the utmost consideration and taking into account the individual's particular situation."[1643]

[1641] Council of Europe, note 1343 above.

[1642] Council Decision of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/CE on the mutual recognition of decisions on the expulsion of third country nationals, 2004/191/CE, *Official Journal L 060*, 27 February 2004, pp. 55-57. *See* Charter of Fundamental Rights of the European Union, *Official Journal C 364*, 18 December 2000, pp. 1-22, article 1 ("Human dignity – Human dignity is inviolable. It must be respected and protected."), article 18 ("Right to asylum – The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.") and article 19 ("Protection in the event of removal, expulsion or extradition – 1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.")

[1643] *Règles internationales*, note 56 above, article 17.

(b) Property rights and similar interests

711. There are several authorities supporting the view that an alien expelled should be given a reasonable opportunity to protect the property rights and other interests that he or she may have in the expelling State.[1644]

[1644] "Except in times of war or imminent danger to the security of the State, adequate time should be given to the alien against whom an expulsion or deportation order has been made to wind up his or her personal affairs. The alien should be given a reasonable opportunity to dispose of property and assets, and permission to carry or transfer money and other assets to the country of destination; in no circumstances should the alien be subjected to measures of expropriation or be forced to part with property and assets." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 96. "Further, [the individual] should be given a reasonable time to settle his personal affairs before leaving the country Shigeru Oda, "Legal Status of Aliens", *in* Max Sørensen (dir.) *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, at p. 483. "Irrespective of the existence or non-existence of an unlimited right to expel foreigners, their ill-treatment, abrupt expulsion or expulsion in an offensive manner is a breach of the minimum standards of international law with which their home State may expect compliance. If a State chooses to exercise its sovereign discretion in contravention of this rule, it does not abuse its rights of sovereignty. It simply breaks a prohibitory rule by which its rights of exclusive jurisdiction are limited." Georg Schwarzenberger, "The Fundamental Principles of International Law", *Recueil des cours de l'Académie de droit international*, vol. 87, 1955-I, pp. 290-383, at pp. 309-310. "Arbitrary action is, as has been observed, frequently apparent in the method by which expulsion is effected. That once applied by a certain State in the case of one Hollander, an American citizen, is illustrative. Having been arrested February 8, 1889, on a charge of calumny and forgery, Hollander was held in custody until May 14, following, when, before the trial of the case, he was expelled from the country by executive decree, and without opportunity to see his family or make any business arrangements. ... Even where the justice of the expulsion is not denied, as in the case of naturalized citizens of the United States who, returning to their native countries make themselves obnoxious by boasting of their successful evasion of the local conscription laws, the United States has endeavored, and often with success, to secure an amelioration of the resulting hardship by obtaining a delay in the execution of the order until business affairs could be adjusted and the loss to the individual reduced as much as possible." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 56 (citations omitted). "The most numerous cases arise because of the unduly oppressive exercise of the power of expulsion. It is fundamental that the measure should be confined to its direct object, getting rid of the undesirable foreigner. All unnecessary harshness, therefore, is considered a justification for a claim. Even where an expulsion is admitted to be justifiable, it should be effected with as little injury to the individual and his property interests as is compatible with the safety and interests of the country which expels him. Secretary of State Olney expressed this principle as follows: 'The expulsion of a foreigner is justifiable only when his presence is detrimental to the welfare of the State, and ... when expulsion is resorted to as an extreme police measure it is to be accomplished with due regard to the convenience and property interests of the person expelled.'[1] So, the expulsion by Turkey of Armenians, naturalized citizens of the United States, was confined through diplomatic interposition by the United States to mere removal from Turkish territory, and an excessive incidental imprisonment and other oppression which had been practiced by Turkey as a punishment for their unauthorized naturalization abroad was abandoned.[2]" The principle that an expulsion must be carried out in a manner least injurious to the person affected has been enunciated on several occasions by international tribunals. Thus, summary expulsions, by which individuals were compelled to abandon their property, subjecting it to pillage and destruction, [3] or by which they were forced to sell it at a sacrifice, [4] or by which they were subjected to unnecessary indignities, harshness or oppression, [5] have all been considered by international commissions as just grounds for awards."

Failure to give the alien such opportunity has given rise to international claims.[1645]

712. The Iran-United States Claims Tribunal held, in the *Rankin vs. The Islamic Republic of Iran* case, that an expulsion was unlawful if it denied the alien concerned a reasonable opportunity to protect his or her property interests:

> "The implementation of this policy could, in general terms, be violative of both procedural and substantive limitations on a State's right to expel aliens from its territory, as found in the provisions of the Treaty of Amity and in customary international law. […] For example… by depriving an alien of a reasonable opportunity to protect his property interests prior to his expulsion."[1646]

713. As early as 1892, the Institut de Droit international adopted a provision indicating that aliens who are domiciled or resident, or have a commercial establishment in the expelling State, shall be given the opportunity to settle their affairs and interests before leaving the territory of that State:

Ibid., pp. 59-61, and n. 1 ["Hollander case v. Guatemala, For. Rel., 1895, II, 776. This instruction of Mr. Olney to Mr. Young, Jan. 30, 1896 contains quotations from Rolin-Jacquemyns, von Bar, Bluntschli and Calvo to the effect that harsh or arbitrary expulsion affords good ground for a diplomatic claim. Hollander was summarily expelled, was not permitted to see Ma family or make any business arrangements. He was later permitted to return. In the Scandella case v. Venezuela in 1898 Scandella was summarily arrested, thrown into prison, denied communication with his family and friends, and placed on a steamer, leaving his family without funds, and his property subject to destruction and theft. (For. Rel., 1898, pp. 1137-1148.) See expulsions from Cuba, Mr. Olney to Mr. de Lôme, Sept. 27, 1895, II, 1229-1231; Expulsion of Loewi from Haiti, 1896, For. Rel., 1896, pp. 382-386."], n. 2 ["See For. Rel., 1893, p. 683 el seq."], n. 3 ["Gardiner (U. S.) v. Mexico, Mar. 3, 1849, opin. 269 (not in Moore)"], n. 4 ["Jobson (U. S.) v. Mexico, Mar. 3, 1849, opin. 553 (not in Moore); Gowen and Copeland (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 3354-3359."] and n. 5 ["Maal (Netherlands) v. Venezuela, Feb. 28, 1903, Ralston, 915; Boffolo (Italy) v. Netherlands, Feb. 13, 1903, Ralston, 702. See also Jaurett (U. S.) v. Venezuela, Sen. Doc. 413, 60th Cong. 1st Bess., 20 et seq., 559 et seq. (settled by agreement of Feb. 13, 1909, For. Rel., 1909, 629)."] *See* also Amos S. Hershey, *The Essentials of International Public Law and Organization*, rev. ed., New York, The Macmillan Company, 1927, p. 375.

[1645] In the *Hollander case*, the United States claimed compensation from Guatemala for the summary expulsion of one of their citizens and pointed out that Mr. Hollander "… was literally hurled out of the country, leaving behind wife and children, business, property, everything dear to him and dependent upon him. [and claimed that] The Government of Guatemala, whatever its laws may permit, had not the right in time of peace and domestic tranquillity to expel Hollander without notice or opportunity to make arrangements for his family and business, on account of an alleged offense committed more than three years before …". John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been Party*, vol. IV, Washington, Government Printing Office, 1898, p. 102, at p. 107. *See* also David John Harris, *Cases and Materials on International Law*, 4th ed., London, Sweet & Maxwell, 1991, p. 503: "… under generally accepted principles of international law, a state may expel an alien whenever it wishes, provided it does not carry out the expulsion in an arbitrary manner, such as by using unnecessary force to effect the expulsion or by otherwise mistreating the alien or by refusing to allow the alien a reasonable opportunity to safeguard property." [Dr. Breger's case (expelled from Rhodes in 1938, 6 months notice probably sufficient), Letter from U.S. Dept. of State to Congressman, 1961, 8 Whiteman 861].

[1646] *Rankin v. The Islamic Republic of Iran*, note 136 above, p. 147, n. 20.

> "Deportation of aliens who are domiciled or resident or who have a commercial establishment in the territory shall only be ordered in a manner that does not betray the trust they have had in the laws of the State. It shall give them the freedom to use, directly where possible or by the mediation of a third party chosen by them, every possible legal process to settle their affairs and their interests, including their assets and liabilities, in the territory."[1647]

714. Such considerations are taken into account in national laws. The relevant legislation may expressly (1) afford the alien a reasonable opportunity to settle any claims for wages or other entitlements even after the alien departs the State;[1648] or (2) provide for the winding up of an expelled alien's business.[1649] The relevant legislation may also provide for the necessary actions to be taken in order to ensure the safety of the alien's property while the alien is detained pending deportation.[1650]

2. Detention

715. Several instances of practice support the view that detention pending deportation is not unlawful provided that it is in conformity with certain requirements.[1651]

716. In the *Ben Tillett* case, the arbitrator recognized the right of the expelling State to detain an alien with a view to ensuring his or her deportation. Moreover, the arbitrator was of the opinion that, depending on the circumstances of the case and, in particular, on the danger which the individual may represent for public order, a State may lawfully detain an alien even before a deportation order. The arbitrator also held that a State was under no obligation to provide special detention facilities for deportees:

> "Considering that while recognizing the right of a State to expel, it should not be denied the means to guarantee the effectiveness of its injunctions; that it has to be able to watch over aliens of whom it may see the presence as an hazard for the public order, and that it may keep them in custody if ever it fears that those who are banned from its territory might elude its surveillance;[1652]

[1647] *Règles internationales*, note 56 above, article 41 [French original].

[1648] Argentina, 2004 Act, article 68.

[1649] Nigeria, 1963 Act, article 47.

[1650] Belarus, 1999 Council Decision, article 17.

[1651] *See*, however, Shigeru Oda, "Legal Status of Aliens", *in Max* Sørensen (dir.) *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, at p. 483 ("Compulsory detention of an alien under an expulsion order is to be avoided, except in cases where he refuses to leave or tries to escape from control of the state authorities.")

[1652] Affaire Ben Tillett, note 1262 above, p. 269 [French original].

> "Considering … that, since an expulsion order does normally not precede the events that justify it, if a State was not able to use the necessary means of coercion in order to keep in custody for a few hours, until the measure is officially adopted, an alien whose conduct has become a cause of trouble, the latter would have the opportunity to escape from the police, and the Government would find itself armless;"[1653]
>
> "Considering, on the other hand, in law, that it is impossible to force a State either to build special facilities which would be exclusively affected to the preventive detention of aliens from the time of their arrest until the enforcement of the expulsion measure, or to reserve to those aliens a special place in the facilities that already exist; that the Government of Belgium, by isolating Benn Tillett and then protecting him from contact with other accused, has satisfied the requirements of international courtesy."[1654]

717. The Arbitrator also found that given the circumstances of the case, Belgium had not acted unlawfully by detaining Mr. Ben Tillett for 26 hours,[1655] and that the conditions of detention were acceptable.[1656]

718. The Commission which delivered the decision in the *Daniel Dillon* case addressed the issue of the minimum standard of treatment prescribed by international law with respect to the detention of an alien pending deportation. The Commission held that the long period of detention and the lack of information given to the claimant with respect to the purpose of his detention constituted maltreatment incompatible with international law.

> "With regard to the question of mistreatment the Commission holds that there is not sufficient evidence to show that the rooms in which the claimant was detained were below such a minimum standard as is required by international law. Also the evidence regarding the food served him and the lack of bed and bed clothing is scanty. The long period of detention, however, and the keeping of the claimant *incommunicado* and uninformed about the purpose of his detention, constitute in the opinion of the Commission a maltreatment and a hardship unwarranted by the purpose of the arrest and amounting to such a degree as to make the United Mexican States responsible under international law."[1657]

719. Commenting on article 13 of the International Covenant on Civil and Political Rights, discussed above in Part VIII, the Human Rights Committee has pointed out that if a deportation

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[1653] Ibid., p. 270 [French original].

[1654] Ibid., p. 271 [French original].

[1655] Ibid.

[1656] Ibid., pp. 271-272.

[1657] *Daniel Dillon (U.S.A.) v. United Mexican States,* Mexico-U.S.A. General Claims Commission, Award of 3 October 1928, United Nations, *Reports of International Arbitral Awards*, vol. IV, pp. 368-371, at p. 369.

procedure entails arrest, the State Party shall grant the individual concerned the safeguards contained in articles 9[1658] and 10[1659] of the Covenant for the case of deprivation of liberty.[1660]

720. The European Convention on Human Rights explicitly recognizes the right of a State to detain an alien pending his or her deportation. Article 5, paragraph 1 of the Convention provides as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> […]
>
> "(f) the lawful arrest or detention […] of a person against whom action is being taken with a view to deportation …"

721. In the *Case of Chahal v. United Kingdom*, the European Court of Human Rights clarified in many respects the content of article 5, paragraph 1 (f). The Court held that this provision did not require that detention pending deportation be "reasonably considered necessary, for example to prevent his committing an offence or fleeing".[1661] However, the Court indicated that detention was permitted only as long as deportation proceedings were in progress and provided that the duration of such proceedings was not excessive.

[1658] Article 9 of the Covenant provides: "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

[1659] Article 10 of the Covenant provides: "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."

[1660] Human Rights Committee, General Comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, para. 9.

[1661] European Court of Human Rights, *Case of Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 112. The Court reiterated its position in the *Case of Conka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application No. 51564/99, para. 38.

> "The Court recalls, however, that any deprivation of liberty under Article 5 paragraph 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 paragraph 1 (f) … It is thus necessary to determine whether the duration of the deportation proceedings was excessive."[1662]

722. In addition, according to the Court, detention pending deportation should be in conformity with law and subject to judicial review. In this regard, "lawfulness" refers to conformity to national law, but also requires "that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness."[1663] Moreover, judicial review "should … be wide enough to bear on those conditions which are essential for the 'lawful' detention of a person according to Article 5 paragraph 1 …".[1664]

723. Attention may also be drawn to the body of principles for the protection of all persons under any form of detention or imprisonment, annexed to General Assembly resolution 43/173. Of particular relevance to the detention pending deportation is article 8 of the said principles, according to which:

> "Persons in detention [*i.e.* persons 'deprived of personal liberty except as a result of conviction for an offense'; cf. Use of Terms, (b)] shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons."[1665]

724. The issue of expulsion pending deportation was raised by the Special Rapporteur on the human rights of migrants, Gabriela Rodríguez Pizarro. Among the aspects highlighted by the Special Rapporteur are the need for periodical review of decisions on detention; the existence of a right to appeal; the non-punitive character of administrative detention; the requirement that detention not last more than the time necessary for the deportation of the individual concerned; and the requirement that detention end when a deportation cannot be enforced for reasons that are not attributable to the migrant.

[1662] European Court Of Human Rights, *Case of Chahal v. United Kingdom,* Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 113.

[1663] Ibid., para. 118. See also *Case of Conka v. Belgium,* Judgment (Merits and Just Satisfaction), 5 February 2002, Application No. 51564/99, para. 39.

[1664] European Court Of Human Rights, *Case of Chahal v. United Kingdom,* Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 127.

[1665] *See* General Assembly resolution 43/173, 9 December 1988, annex, body of principles for the protection of all persons under any form of detention or imprisonment, principle 8.

> "… The right to judicial or administrative review of the lawfulness of detention, as well as the right to appeal against the detention/deportation decision/order or to apply for bail or other non-custodial measures, are not guaranteed in cases of administrative detention."[1666]
>
> "Administrative deprivation of liberty should last only for the time necessary for the deportation/expulsion to become effective. Deprivation of liberty should never be indefinite."[1667]
>
> "… The Special Rapporteur is particularly concerned that recently enacted anti-terrorism legislation, allowing for the detention of migrants on the basis of vague, unspecified allegations of threats to national security, can lead to indefinite detention when migrants cannot be immediately deported because that would imply a threat to their security and human rights."[1668] [Citation omitted.]
>
> "… Administrative detention should never be punitive in nature …"[1669]
>
> [The Special Rapporteur then made the following recommendation]
>
> "Ensuring that the law sets a limit on detention pending deportation and that under no circumstance is detention indefinite. … The decision to detain should be automatically reviewed periodically on the basis of clear legislative criteria. Detention should end when a deportation order cannot be executed for other reasons that are not the fault of the migrant."[1670]

725. In 1982, the Institut de Droit international was of the view that a person expelled should not be deprived of her or his liberty pending deportation.[1671]

726. National laws vary considerably with respect to the legality and the conditions of detention pending deportation. A State may detain an alien prior to deportation as a standard part of the deportation process,[1672] or (1) when the alien has evaded or threatens to evade deportation, or has

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[1666] Commission on Human Rights Migrant Workers, Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62, E/CN.4/2003/85, 30 December 2002, para. 20.

[1667] Ibid., para. 35.

[1668] Ibid., para. 37.

[1669] Ibid., para. 43.

[1670] Ibid., para. 75 (g).

[1671] "If the deportee is free no restriction shall be placed on such person during this period." *Règles internationales*, note 56 above, article 32 [French original].

[1672] Argentina, 2004 Act, articles 35, 70-72; Australia, 1958 Act, articles 196, 253, 255; Austria, 2005 Act, article 3.76(2); Belarus, 1998 Law, article 30; Bosnia and Herzegovina, 2003 Law, articles 28(3), 43(5), 68(1);

violated conditions of provisional release from detention;[1673] (2) when the alien has committed certain criminal or other violations, or threatens the State's *ordre public* or national security;[1674] (3) to allow the relevant authorities to determine the alien's identity or nationality, or to ensure the alien's post-transfer security;[1675] or (4) when deemed necessary to fulfil the deportation, including with respect to the arrangement of transportation.[1676] A State may (1) prohibit the alien's detention when the alien has been ordered to depart voluntarily;[1677] or (2) permit the alien's detention or other restrictions on the alien's residence or movements prior to the alien's voluntary departure.[1678]

727. The relevant law may establish a detention's term, relevant procedures, or the rights and recourses available to the alien.[1679] A State may specifically provide for the detention of

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Brazil, 1980 Law, article 60; Kenya, 1967 Act, article 12(2); Madagascar, 1962 Law, article 17; Malaysia, 1959-1963 Act, articles 31, 34(1), 35; Nigeria, 1963 Act, article 23(2); Russian Federation, 2002 Law No. 115-FZ, articles 31(9), 34(5); and United States, INA, sections 241(a)(2), 507(b)(1), (2)(C), (c). Such detention may be specifically imposed on an alien allegedly involved in terrorism, and may include the period of the alien's criminal trial and the alien's fulfilment of a resulting sentence (United States, INA, section 507(b)(1), (2)(C), (c)).

[1673] Belarus, 1993 Law, article 26; Bosnia and Herzegovina, 2003 Law, article 68(2); Columbia, 1995 Decree, article 93; Czech Republic, 1999 Act, section 124(1); Germany, 2004 Act, article 62(2); Greece, 2001 Law, article 44(3); Hungary, 2001 Act, article 46(1)(a)-(b); Italy, 1998 Law No. 40, article 11(6), 1996 Decree-Law, article 7(3); Japan, 1951 Order, article 55(1); Republic of Korea, 1992 Act, article 66, 1993 Decree, article 80; Poland, 2003 Act No. 1775, article 101(1), and Switzerland, 1931 Federal Law, article 13b(1)(c).

[1674] Bosnia and Herzegovina, 2003 Law, article 68(2); Columbia, 1995 Decree, article 93; Czech Republic, 1999 Act, section 124(1); Greece, 2001 Law, article 44(3); Hungary, 2001 Act, article 46(1)(c)-(e), (2), (9); and United States, INA, section 241(a)(6).

[1675] Austria, 2005 Act, article 3.80(4)(1); Brazil, 1980 Law, article 60; China, 2003 Provisions, article 184; Italy, 1998 Decree-Law No. 286, article 14(1), 1998 Law No. 40, article 12(1), 1996 Decree-Law, article 7(3); and Nigeria, 1963 Act, article 31(3).

[1676] China, 2003 Provisions, article 184; Croatia, 2003 Law, article 58; France, Code, article L551-1; Germany, 2004 Act, article 62(1); Italy, 1998 Decree-Law No. 286, article 14(1), 1998 Law No. 40, article 12(1); Japan, 1951 Order, articles 13-2, 52(5); Kenya, 1967 Act, article 8(2)(b), (3)-(4); Republic of Korea, 1992 Act, article 63(1); Malaysia, 1959-1963 Act, article 34(1); Nigeria, 1963 Act, articles 31(3), 45; Panama, 1960 Decree-Law, articles 59, 83; Poland, 2003 Act No. 1775, article 101(4); Portugal, 1998 Decree-Law, articles 22(4), 124(2); Switzerland, 1931 Federal Law, article 13b(1)(a)-(b); and United States, INA, section 241(a)(1)(C). Such detention may be expressly permitted during wartime (Nigeria, 1963 Act, article 45).

[1677] Portugal, 1998 Decree-Law, article 100(1).

[1678] Japan, 1951 Order, articles 55-3(3); and Portugal, 1998 Decree-Law, article 123(2).

[1679] Argentina, 2004 Act, articles 70-72; Australia, 1958 Act, articles 196, 253-54, 255(6); Austria, 2005 Act, articles 3.76(3)-(7), 3.78-80; Belarus, 1998 Law, article 30, 1993 Law, article 26; Bosnia and Herzegovina, 2003 Law, articles 65(4), 69-71; Brazil, 1980 Law, article 60; Croatia, 2003 Law, article 58; Czech Republic, 1999 Act, section 124(2); France, Code, articles L551-2, L551-3, L552-1, L552-2, L552-3, L552-6, L552-7, L552-8, L552-9, L552-10, L552-11, L552-12, L553-1, L553-2, L553-3, L553-4, L553-5, L553-6, L554-1, L554-2, L554-3, L555-1, L555-2, L561-1; Germany, 2004 Act, article 62(1)-(3); Greece, 2001 Law, article 44(3); Hungary, 2001 Act, article 46(3)-(7); Italy, 1998 Decree-Law No. 286, article 14(1)-(5*bis*), (7), (9), 1998 Law No. 40, minors,[1680] potentially protected persons,[1681] or aliens allegedly involved in terrorism.[1682] A State may allow for the alien to post bail.[1683] A State may restrict the alien's residence or activities, or impose supervision, in lieu of detention or without otherwise specifically providing for detention.[1684] A State may arrange for the transfer of the alien's custody between itself and another State.[1685] A State may require the alien to pay for the detention,[1686] or expressly bind itself to pay for it.[1687] A State may expressly characterize the alien's removal as not constituting a detention.[1688]

728. Some national courts have recognized the right to detain aliens pending deportation.[1689] With respect to the length of detention, numerous national courts have indicated that an alien may be

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article 12(1)-(7), (9), 1996 Decree-Law, article 7(3); Japan, 1951 Order, articles 2(15)-(16), 13-2, 54, 55(2)-(5), 61-3, 61-3-2, 61-4, 61-6, 61-7; Republic of Korea, 1993 Decree, articles 77(1), 78; Malaysia, 1959-1963 Act, articles 34(1), (3), 35; Nigeria, 1963 Act, article 31; Panama, 1960 Decree-Law, article 59; Poland, 2003 Act No. 1775, article 101(1)-(2), (3)(1), (4)-(7); Russian Federation, 2002 Law No. 115-FZ, articles 31(9), 34(5); Sweden, 1989 Act, sections 6.18-31; Switzerland, 1931 Federal Law, articles 13b(2)-(3), 13c-d; and United States, INA, sections 241(g), 507(b)(2)(D), (c)(2), (d)-(e).

[1680] Austria, 2005 Act, article 3.79(2)-(3); and Sweden, 1989 Act, sections 6.19, 6.22.

[1681] Austria, 2005 Act, article 3.80(5); and Switzerland, 1931 Federal Law, articles 13a(a), (d), 13b(1)(d).

[1682] United States, INA, section 507(b)(2)(D), (c)(2), (d)-(e).

[1683] Belarus, 1998 Law, article 30; Japan, 1951 Order, articles 54(2)-(3), 55(3); Republic of Korea, 1992 Act, articles 65, 66(2)-(3), 1993 Decree, articles 79-80; Malaysia, 1959-1963 Act, article 34(1); and United States, INA, section 241(c)(2)(C).

[1684] China, 1986 Rules, article 15; France, Code, articles L513-4, L552-4, L552-5, L552-6, L552-7, L552-8, L552-9, L552-10, L552-11, L552-12, L555-1: Hungary, 2001 Act, article 46(8); Japan, 1951 Order, article 52(6); Republic of Korea, 1992 Act, article 63(2), 1993 Decree, article 78(2)-(3); Madagascar. 1962 Law, article 17; Nigeria, 1963 Act, article 23(2); and United States, INA, section 241(a)(3).

[1685] Australia, 1958 Act, article 254.

[1686] Ibid., articles 209, 211.

[1687] Italy, 1998 Decree-Law No. 286, article 14(9), 1998 Law No. 40, article 12(9); Switzerland, 1999 Ordinance, article 15(2)-(3); and United States, INA, sections 103(a)(11), 241(c)(2)(B).

[1688] Australia, 1958 Act, article 198A(4).

[1689] "At the same time, however, this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Charles Demore, District Director, San Francisco District of Immigration and Naturalization Service, et al., v. Hyung Joon Kim*, United States Supreme Court, 29 April 2003 [No. 01-1491], 538 U.S. 510; "By virtue of article 22 (part 2) of the Constitution of the Russian Federation, an alien or stateless person present in the territory of the Russian Federation may, in the event of forcible deportation from the Russian Federation, until the court decision be subjected to detention for the period necessary for the deportation, but not for more than 48 hours." *Ruling No. 6*, note 239 above. "*Ex abundantia,* the Court of appeal holds that if, in the opinion of the State, it would be in the interests of public order or safety that M could not be released from custody pending his possible expulsion to a country other than Yugoslavia, or that other restrictive measures be taken against him, it is the responsibility of the State to take such measures as detained only as long as is reasonably necessary to arrange the alien's deportation.[1690] In some cases, courts have held extensive periods of detention pending deportation to be excessive.[1691]

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are necessary and possible within the law." *SM v. State Secretary for Justice*, Netherlands Court of Appeal of The Hague, 29 May 1980; "It is understood that detention of the expelled individual is lawful, if the public interest demands it, during the time necessary to arrange his embarcation or transportation abroad." *In re de Souza,* Federal Supreme Court, 29 October 1934, *Annual Digest and Reports of Public International Law Cases*, 1933-1934, H. Lauterpacht (ed.), Case No. 139, pp. 333-334, at p. 334; "The charge that there is an obligation to set the illegal immigrant at liberty while his case is under consideration is manifestly incompatible with the above views; such a charge would be equivalent to weakening or even to annulling the exercise of power recognized above. Should the Office of Immigration decide not to deport the alien or should the appellant not choose this solution, there remains no other alternative than to hold him in custody in the place of detention for immigrants until the necessary requisites for his admission to the country have been completed." *In re Grunblatt,* Supreme Court, Argentina, 7 April 1948, *Annual Digest and Reports of Public International Law Cases*, 1948, H. Lauterpacht (ed.), Case No. 84, p. 278; "By the second, the Executive Power is enabled to order the detention of more dangerous aliens for the period up to the moment of embarkation, when the public safety requires this." *In re Bernardo Groisman,* Federal Supreme Court, 22 July 1935, *Annual Digest and Reports of Public International Law Cases*, 1935-1937, H. Lauterpacht (ed.), Case No. 163, pp. 345-347, at p. 346; "In *R v Governor of Durham Prison, ex p Singh* [1984] 1 All ER 983, [1984] 1 WLR 704 it was held, in a decision which has never been questioned (and which was followed by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1996] 4 All ER 256, [1997] AC 97), that such detention was permissible only for such time as was reasonably necessary for the process of deportation to be carried out." *A and others v Secretary of State for the Home Department,* United Kingdom House of Lords, [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169 , 16 December 2004 (Lord Bingham of Cornhill); *Rex v. Governor of H.M. Prison at Brixton and the Secretary of State for Home Affairs, Ex parte Sliwa,* Court of Appeal of England, 20 December 1951, *International Law Reports*, 1951, H. Lauterpacht (ed.), Case No. 95, pp. 310-313; *Aronowicz v. Minister of the Interior,* Appellate Division of the Supreme Court, 15 November and 12 December 1949, *International Law Reports*, 1950, H. Lauterpacht (ed.), Case No. 79, pp. 258-259; and *Al-Kateb v Godwin*, High Court of Australia, [2004] HCA 37, 6 August 2004.

[1690] See, e.g., *In re de Souza,* Federal Supreme Court, 29 October 1934, *Annual Digest and Reports of Public International Law Cases*, 1933-1934, H. Lauterpacht (ed.), Case No. 139, pp. 333-334, at p. 334 "It is understood that detention of the expelled individual is lawful, if the public interest demands it, during the time necessary to arrange his embarcation or transportation abroad."; "In answering that basic question, the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal." *Kestutis Zadvydas, Petitioner, v Christine G. Davis, United States Supreme Court,* 533 U. S. 678, 28 June 2001; "However justifiable may be the reasons of public order which determined the Executive to decree the removal of an inhabitant of this territory, it is beyond doubt that the deprivation of liberty to that end may not be continued beyond the period in which that precautionary measure is changed into a punishment without the law." *In re Flaumembaum,* Cámara Criminal de la Capital, 24 June 1941, *Annual Digest and Reports of Public International Law Cases*, 1941-1942, H. Lauterpacht (ed.), Case No. 94, pp. 313-315, at p. 313.

[1691] See, e.g., *Ruling No. 6*, note 239 above; "It is not possible to interpret that decision [In re Groisman] as a recognition of the right of the Executive to prolong the detention in the country of a person domiciled here, even for the purpose of making effective his legal expulsion, beyond the period in which such precautionary measure is transformed into a penalty not authorized by law, in this case nineteen months, without judgment or hearing, and under a branch of government which even in a state of siege does not have such power (National Constitution, Articles 23, 29, and 95). On the contrary, it is for the courts in each case to inquire whether or not the detention exceeds the proper limits." In re Cantor, Federal Supreme Court, 6 April 1938, Annual Digest and Reports of Public International Law Cases, 1938-1940, H. Lauterpacht (ed.), Case No. 143, pp. 392-393; In re Hely, Venezuelan Federal Court of Cassation, April 16, 1941 (Per ILR, 1941-42, p. 313)(alien should be set at

729. In a recent series of cases,[1692] national courts have considered the question of whether aliens can be detained indefinitely where expulsion is not possible in the foreseeable future. In a case decided in 1998,[1693] the Constitutional Court of the Russian Federation examined, in the context of the expulsion of a stateless alien, the constitutionality of a statute which would allow the alien's indefinite detention. The Court concluded:

> "6. By virtue of article 22 (part 2) of the Constitution of the Russian Federation, an alien or stateless person present in the territory of the Russian Federation may, in the event of forcible deportation from the Russian Federation, until the court decision be subjected to detention for the period necessary for the deportation, but not for more than 48 hours. The person may remain in detention for a longer period only on the basis of a court decision and only if the deportation order cannot be implemented without such detention.

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liberty, having already been in confinement longer than the penalty (six months to one year) provided by law for the offence with which he was charged); In re de Souza, Federal Supreme Court, 29 October 1934, Annual Digest and Reports of Public International Law Cases, 1933-1934, H. Lauterpacht (ed.), Case No. 139, pp. 333-334 (detention of 7 months is unlawful). But see In re Bernardo Groisman, Federal Supreme Court, 22 July 1935, Annual Digest and Reports of Public International Law Cases, 1935-1937, H. Lauterpacht (ed.), Case No. 163, pp. 345-347 (detention could exceed three days); "As a result, negotiations on the reception of a deportee tended to be prolonged, and Aronowicz's seven weeks in custody could not be considered excessive. There was no evidence that the Minister had acted in bad faith, and therefore he had not exceeded his powers.") Aronowicz v. Minister of the Interior, Appellate Division of the Supreme Court, 15 November and 12 December 1949 [International Law Reports, 1950, H. Lauterpacht (ed.), Case No. 79, pp. 258-259, at p. 259; Re Janoczka, Manitoba Court of Appeal, Canada, 4 August 1932, Annual Digest of Public International Law Cases, 1931-1932, H. Lauterpacht (ed.), Case No. 154, pp. 291-292 (no undue delay for 9 months detention while negotiating admission to other State); "The period of time which Judges have found to be appropriate in peace-time varies from one month to four months. Perhaps, under war-time circumstances, a longer period might be justified." United States Ex Rel. Janivaris v. Nicolls, United States, District Court, District of Massachusetts, 20 October 1942, Annual Digest and Reports of Public International Law Cases, 1941-1942, H. Lauterpacht (ed.), Case No. 95, pp. 316-318, at p. 317 (citations omitted).

[1692] Earlier cases addressing the question of the indefinite detention of aliens pending deportation include the following: "The right to arrest and hold or imprison an alien is nothing but a necessary incident of the right to exclude or deport. There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as a punishment for crime. Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation or exclusion proceedings are not punishment for crime." *Petition of Brooks*, United States District Court, District of Massachusetts, 28 April 1925, *Annual Digest of Public International Law Cases*, 1927-1928, Arnold D. McNair and H. Lauterpacht (eds.), Case No. 232, p. 340; "Indefinite imprisonment, however, finds no support in the law, because it contravenes the principles of defence of liberty and the imperatives of justice embodied in our legislation." *In re de Souza*, Federal Supreme Court, 29 October 1934, *Annual Digest and Reports of Public International Law Cases*, 1933-1934, H. Lauterpacht (ed.), Case No. 139, pp. 333-334, at p. 334; *In re Forster*, Supreme Federal Tribunal of Brazil, 28 January 1942. (The former legislation which limited the time of imprisonment had been abrogated, and there was now no limit, except at the discretion of the Ministry of Justice.)

[1693] *Ruling No. 6*, note 239 above.

> "Thus a court decision is required to give the person protection not only from arbitrary extension of the period of detention beyond 48 hours but also from unlawful detention as such, since the court in any case evaluates the lawfulness and validity of the use of detention for the person concerned.
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> "It follows from article 22 of the Constitution of the Russian Federation, read in conjunction with article 55 (parts 2 and 3), that detention for an indefinite period cannot be considered an admissible restriction of everyone's right to liberty and security of person and is essentially a derogation of that right. For that reason, the provision of the USSR Act 'On the legal status of aliens in the USSR' concerning detention for the period necessary for deportation, which the complainant is contesting, should not be considered grounds for detention for an indefinite period, even when the solution of the question of deportation of a stateless person may be delayed because no State agrees to receive the person being deported. Otherwise detention as a measure necessary to ensure implementation of the deportation decision would become a separate form of punishment, not envisaged in the legislation of the Russian Federation and contradicting the above-mentioned norms of the Constitution of the Russian Federation."[1694]

730. In *Zadvydas v. Davis,*[1695] the Supreme Court of the United States was asked to decide the constitutionality of a statute according to which an alien present in the United States[1696] could be kept in detention indefinitely pending deportation.[1697] Rather than invalidating the statute, the Court noted that:

> "'[I]t is a cardinal principle of statutory interpretation, however, that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided'."[1698]

[1694] The Court also held that the statute, to the extent it allowed detention for more than 48 hours without a court order, was unconstitutional. *Ruling No. 6*, note 239 above, para. 6 [Russian original].

[1695] *Kestutis Zadvydas, Petitioner, v Christine G. Davis* and *Immigration and Naturalization Service v. Kim Ho ma*, U.S. Supreme Court, 28 June 2001, Nos. 99-7791 and 00-38.

[1696] Rather than an alien seeking admission into the United States. See discussion on *Clark v. Martinez*, infra. The Court distinguished *Zadvydas* from other cases in which it had seemingly allowed for indefinite detention, such as *Shaughnessy* v. *United States ex rel. Mezei,* 345 U. S. 206 (1953) (involving a once lawfully admitted alien who left the United States, returned after a trip abroad, was refused admission, and was left on Ellis Island, indefinitely detained there because the Government could not find another country to accept him), on this basis.

[1697] "[The statute] sets no 'limit on the length of time beyond the removal period that an alien who falls within one of the Section 1231(a)(6) categories may be detained'. *Kestutis Zadvydas*, note 1695 above, p. 689.

[1698] Ibid., p. 689 (citing *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932); see also *United States* v. *X-Citement Video, Inc.,* 513 U. S. 64, 78 (1994); *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401 (1916); cf. *Almendarez-Torres*

The Court subsequently noted:

> "A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to 'depriv[e]' any 'person ... of ... liberty ... without due process of law.' Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects. *See Foucha v. Louisiana, 504 U.S. 71, 80 (1992).* […]
>
> "The statute, says the Government, has two regulatory goals: 'ensuring the appearance of aliens at future immigration proceedings' and '[p]reventing danger to the community.' Brief for Respondents in No. 99-7791, p. 24. But by definition the first justification – preventing flight – is weak or nonexistent where removal seems a remote possibility at best. As this Court said in *Jackson* v. *Indiana*, 406 U. S. 715 (1972), where detention's goal is no longer practically attainable, detention no longer 'bear[s] [a] reasonable relation to the purpose for which the individual [was] committed.' *Id.*, at 738."[1699]

Accordingly, the Court held that:

> "In answering that basic question [of whether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority], the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute. In that case, of course, the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions. […]
>
> "We realize that recognizing this necessary Executive leeway will often call for difficult judgments. In order to limit the occasions when courts will need to make them, we think it practically necessary to recognize some presumptively reasonable period of detention. […]

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v. *United States*, 523 U. S. 224, 238 (1998) (construction of statute that avoids invalidation best reflects congressional will)).

[1699] The Court, however, limited the scope of its decision to expulsion of lawful immigrants and specifically noted that "Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." *Kestutis Zadvydas*, note 1695 above, pp. 690 and 696.

> "While an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months. See Juris. Statement of United States in *United States* v. *Witkovich*, O. T. 1956, No. 295, pp. 8-9. Consequently, for the sake of uniform administration in the federal courts, we recognize that period. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the "reasonably foreseeable future" conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."[1700]

731. In a subsequent decision, *Clark v. Martinez*,[1701] the Supreme Court of the United States extended its ruling that an alien may only be detained only as long as may be reasonably necessary to effect removal to inadmissible aliens. As a consequence, it held that:

> "Since the Government has suggested no reason why the period of time reasonably necessary to effect removal is longer for an inadmissible alien, the 6-month presumptive detention period we prescribed in *Zadvydas* applies. See 533 U. S., at 699-701. Both Martinez and Benitez were detained well beyond six months after their removal orders became final. The Government having brought forward nothing to indicate that a substantial likelihood of removal subsists despite the passage of six months (indeed, it concedes that it is no longer even involved in repatriation negotiations with Cuba); and the District Court in each case having determined that removal to Cuba is not reasonably foreseeable; the petitions for habeas corpus should have been granted."[1702]

732. A similar question was addressed by the High Court of Australia in *Al-Kateb v. Godwin*,[1703] in which the Court considered whether administrative detention of unlawful non-citizens could continue indefinitely. The Court upheld the constitutionality of the contested statute. Judge McHugh noted that:

[1700] Ibid., pp. 699-701.

[1701] Seattle, Immigration and Customs Enforcement, et al. v. Martinez, U.S. Supreme Court, 12 January 2005, No. 03-878.

[1702] Ibid., p. 15.

[1703] *Al-Kateb v. Godwin*, High Court, 6 August 2004, 2004 HCA 37.

> "A law requiring the detention of the alien takes its character from the purpose of the detention. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive."[1704]

733. Several of the Lords also distinguished the judgments rendered in the *Zadvydas v. Davis case*[1705] of the United States Supreme Court, the *R v. Governor of Durham Prison, ex parte Hardial Singh case*[1706] of the Queen's Bench Division in the United Kingdom, and *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* case[1707] of the Privy Council for Hong Kong, in which indefinite detention had been found unlawful. They pointed out that indefinite detention had already survived a legal challenge in the *Lloyd v Wallach* case,[1708] involving the War Precautions Act of 1914 (Cth), and *Ex parte Walsh*,[1709] regarding the National Security (General) Regulations of 1939 (Cth).

734. In *Al-Kateb*, it was also noted that while the statute was constitutional, no consideration was given to the question of whether the statute conformed with Australia's international obligations. The Court specifically rejected the contention that the Constitution should be interpreted in conformity with principles of public international law.[1710]

735. In *A and others v. Secretary of State for the Home Department*,[1711] the House of Lords of the United Kingdom considered whether the United Kingdom could, pursuant to a derogation to Article 5

[1704] Ibid.

[1705] *Kestutis Zadvydas*, note 1695 above.

[1706] "Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorize detention if the individual is detained in one case pending the making of a deportation order and, in the other case, pending his removal. … Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose." *Regina v. Governor of Durham Prison, ex parte Hardial Singh*, [1984] 1 WLR 704; [1984] 1 All ER 983.

[1707] Tan Te Lam v Superintendent of Tai A Chau Detention Centre, Privy Council of Hong Kong, [1997] AC 97.

[1708] *Lloyd v Wallach*, 20 CLR 299 (1915).

[1709] *Ex parte Walsh*, [1942] ALR 359.

[1710] "Finally, contrary to the view of Kirby J, courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900. Rules of international law at that date might in some cases throw some light on the meaning of a constitutional provision." *Ex parte Walsh*, [1942] ALR 359. (Gleeson, C. J.).

[1711] *A and others v Secretary of State for the Home Department*, United Kingdom House of Lords, [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169, 16 December 2004.

of the European Convention on Human Rights, detain indefinitely aliens subject to an expulsion order but whose deportation was not possible.

736. It was noted that pursuant to the prior ruling of the House of Lords in *R. v. Governor of Durham Prison ex parte Singh*, individuals subject to expulsion could only be detained "… only for such time as was reasonably necessary for the process of deportation to be carried out."[1712] Moreover, it was recalled that in accordance with the ruling of the European Court of Human Rights in the *Chahal* case, some individuals involved in international terrorism could not be expelled from the United Kingdom. Hence, a formal notice of derogation had been submitted with regard to Article 5.

737. The House of Lords ruled that the provisions of the challenged statute allowing for the indefinite detention of aliens without charge or trial were unlawful despite the derogation requested. The provision was considered disproportionate and discriminatory, since it applied differently to non-nationals and nationals suspected of involvement in terrorism. Lord Bingham of Cornhill pointed out that:

> "Article 15 requires any derogating measures to go no further than is strictly required by the exigencies of the situation and the prohibition of discrimination on grounds of nationality or immigration status has not been the subject of derogation. Article 14 remains in full force. Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is not the measure in issue but the difference in treatment between one person or group and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another."[1713]

3. Practical arrangements

738. There may be situations in which a State refuses to admit an individual who has been expelled from another State. This may create serious practical problems for all concerned. Consequently, States may try to avoid this possibility by obtaining an assurance of admission from a State before the alien's departure.

> "As a consequence of greatly improved communications and international co-operation between police forces, an alien deported from one State is very frequently denied admission to other States; in the absence of political factors, the reasons which may lead one State to deport a person render him equally unacceptable to other States. A practical problem of which all

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[1712] Ibid., para. 8 (Lord Bingham of Cornhill). Lord Nicholls of Birkenhead pointed out that "[I]ndefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified."

[1713] Ibid., para. 68.

> national immigration authorities are acutely conscious is the need to assist air, land and sea carriers in the task of carrying a deportee to a destination where he will be accepted. Either by law or by settled administrative arrangements, most countries require the carrier which conveyed a deportable alien to its territory to convey him out again at the carrier's expense; no carrier views with equanimity the prospect of having a permanent passenger on board and will justifiably look to the deporting State for a firm indication of a destination where the deported alien will be accepted. By the municipal law of most States, therefore, deporting authorities are empowered to specify a particular destination in a deportation order; this specification follows enquiries leading to an assurance by authorities of another State that the latter will accept the alien."[1714]

739. The question of practical arrangements for the deportation of an individual is addressed in annex 9 to the Convention on International Civil Aviation.[1715] Attention may be drawn in particular to paragraph 5.18, which deals with the organization and the cost of the removal. This paragraph provides:

> "5.18 Contracting States removing deportees from their territories shall assume all obligations, responsibilities and costs associated with the removal."

740. The question of transportation arrangements for deportation is addressed in detail in the legislation of many States. A State may provide for the alien's forcible escort from the State as an alternative to voluntary departure,[1716] or as the standard means of deportation in certain or all instances.[1717] A State may likewise undertake such an escort when (1) security or other specific reasons so require;[1718] (2) the alien fails to depart voluntarily from the State; or (3) the alien otherwise

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[1714] Ivan Anthony Shearer, *Extradition in International Law*, Manchester, University Press, 1971, p. 77 (citations omitted) (referring to *United States ex rel. Frangoulis v. Shaughnessy*, 210 F. 2nd 592 (2nd Cir. 1954); *R. v. Governor of Brixton ex parte Sliwa* [1952] 1 K.B. 169 (Ct. App.); *In re Guerreiro*, 18 *Int'l L. Rep.* 315 (Sup. Ct. Argentina, 1951)).

[1715] Convention on International Civil Aviation, Chicago, 7 December 1944, Annex 9 (12th ed.), United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.

[1716] Belarus, 1999 Council Decision, article 4; Brazil, 1981 Decree, article 98(2); China, 1986 Law, article 30, 1987 Note, article 5; Lithuania, 2004 Law, article 129(1); Sweden, 1989 Act, section 8.12; and Switzerland, 1949 Regulation, articles 16(8), 17(1).

[1717] Australia, 1958 Act, articles 198(1A), 198A, 206; Austria, 2005 Act, article 3.46(1)(4); Cameroon, 2000 Decree, articles 60, 62(2); China, 1992 Provisions, article VI, 1987 Note, article 5; France, Code, articles L541-1, L621-1, L624-2, L624-3; Hungary, 2001 Act, article 4(1); Italy, 2005 Law, article 3(1), 1998 Decree-Law No. 286, articles 13(4), 26, 1996 Decree-Law, article 7(3); Lithuania, 2004 Law, article 2(8); Portugal, 1998 Decree-Law, article 21(3); Switzerland, 1949 Regulation, article 17(1), 1931 Federal Law, article 14(1)(b)-(c); and United States, INA, section 241(a). Such a deportation may be imposed on an alien allegedly involved in terrorism (Italy, 2005 Law, article 3(2)).

[1718] Argentina, 2004 Act, article 72; and Austria, 2005 Act, article 3.46(1)(1).

violates pre-deportation conditions.[1719] A State may forcibly escort the alien to the border,[1720] or to a port or airport.[1721] A State may prescribe the procedure or conditions under which the deportation is to be carried out, including with regard to the form of the deportation order.[1722]

741. A State may order the alien to depart via the next available carrier or vessel.[1723] A State may require the transporter which brought the alien into the State's territory to remove the alien,[1724] or may so oblige any other transporter.[1725] A State may limit the circumstances under which a transporter must undertake the alien's removal.[1726] A State may (1) forcibly escort the alien to the relevant vessel or hold the alien there;[1727] or (2) require the transporter to detain an alien already present on the

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[1719] Austria, 2005 Act, article 3.46(1)(2); Belarus, 1993 Law, article 26; Bosnia and Herzegovina, 2003 Law, article 63(4); Brazil, 1981 Decree, article 98(1), 1980 Law, articles 56, 64(b); Chile, 1975 Decree, article 67; China, 2003 Provisions, article 189, 1992 Provisions, article I(iii); Croatia, 2003 Law, article 56; Guatemala, 1999 Regulation, article 98; Hungary, 2001 Act, article 46(1)(b); Iran, 1931 Act, article 11; Italy, 1998 Decree-Law No. 286, article 13(5); Japan, 1951 Order, articles 24(2)-3, (5)-2, (6)-2, (8)-(9), 55-6; Kenya, 1967 Act, article 8(4); Panama, 1960 Decree-Law, article 59; Paraguay, 1996 Law, article 39; Poland, 2003 Act No. 1775, article 95(1); Portugal, 1998 Decree-Law, article 124(1); Russian Federation, 2002 Law No. 115-FZ, article 31(3)-(4); Sweden, 1989 Act, section 8.12; and Switzerland, 1949 Regulation, article 17(1), 1931 Federal Law, article 14(1)(a).

[1720] Belarus, 1999 Council Decision, articles 3, 22, 1998 Law, article 33; France, Code, article L541-1; Poland, 2003 Act No. 1775, article 101(3)(4); and Russian Federation, 2002 Law No. 115-FZ, article 34(3). A State may specify the border crossing to be used by the departing alien (Czech Republic, 1999 Act, section 118(1)).

[1721] Poland, 2003 Act No. 1775, article 101(3)(4).

[1722] Australia, 1958 Act, article 206; Austria, 2005 Act, article 3.46(3); Belarus, 1999 Council Decision, article 4; Bosnia and Herzegovina, 2003 Law, articles 58(1)-(4), 63(1), (3)-(4); Cameroon, 2000 Decree, articles 61, 62(2)-(3); China, 1992 Provisions, articles II-VI, VIII, 1987 Note, article 5; France, Code, articles L541-3, L532-1, L561-1, L561-2; Hungary, 2001 Act, article 44; Italy, 1998 Decree-Law No. 286, article 16(7); Japan, 1951 Order, articles 51-52, 55-3(2), 55-4; Republic of Korea, 1992 Act, article 62, 1993 Decree, article 77(2)-(4); Nigeria, 1963 Act, articles 21(1), 27(2); Poland, 2003 Act No. 1775, article 95(2)-(4); Sweden, 1989 Act, sections 8.13, 8.15; and United States, INA, section 101(a)(47)(A).

[1723] China, 1986 Rules, article 15.

[1724] Argentina, 2004 Act, article 35; Australia, 1958 Act, article 217(1)-(2); Brazil, 1980 Law, article 27; Chile, 1975 Decree, article 11; China, 1986 Rules, article 11(3); Czech Republic, 1999 Act, section 104; France, Code, articles L213-4, L213-5, L213-8; Japan, 1951 Order, article 59; Republic of Korea, 1993 Decree, article 76; Nigeria, 1963 Act, article 17(1); Portugal, 1998 Decree-Law, article 21(1); Sweden, 1989 Act, section 8.6; and United States, INA, section 241(c)(1), (d)(1).

[1725] Australia, 1958 Act, articles 218(1)-(2), 220; Nigeria, 1963 Act, articles 17(2), 22(1); and United States, INA, sections 241(d)(3), 254(c).

[1726] Argentina, 2004 Act, article 43; Australia, 1958 Act, article 221; Czech Republic, 1999 Act, section 104(4); Sweden, 1989 Act, sections 9.2-3; and United States, INA, section 241(c)(1)(A)-(B).

[1727] Australia, 1958 Act, articles 198A(2)(a)-(b), (d), 253(8), 255; Cameroon, 2000 Decree, article 60; Japan, 1951 Order, article 52(3); Republic of Korea, 1992 Act, article 62(2), 1993 Decree, article 77(4); Malaysia, 1959-1963 Act, article 34(2); and Nigeria, 1963 Act, articles 17(3), 22(2).

vessel.[1728] A State may make appropriate ticket arrangements for the alien,[1729] or general arrangements with transporters for the removal of aliens.[1730]

742. A State may impose on the transporter,[1731] or specifically the transporter who brought the alien into the State,[1732] the alien's transportation expenses, including those relating to the alien's pre-deportation maintenance[1733] or forcible escort.[1734] A State may require the alien to pay the cost of the alien's transportation,[1735] or set conditions under which the State shall pay, potentially taking into account any indemnification by the alien's employer or other sponsors, or any contribution from the Government of the alien's State.[1736] A State may also provide for deportation procedures and destinations in cases where the alien lacks travel documents,[1737] including with respect to the

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[1728] Nigeria, 1963 Regulations (L.N. 93), article 7(2); and United States, INA, sections 241(d)(2), 252(b).

[1729] Australia, 1958 Act, article 216.

[1730] Italy, 1998 Decree-Law No. 286, article 14(8), 1998 Law No. 40, article 12(8); and Switzerland, 1999 Ordinance, article 11.

[1731] Australia, 1958 Act, article 220; Cameroon, 2000 Decree, article 60; and Nigeria, 1963 Act, article 17(2).

[1732] Argentina, 2004 Act, article 43(c); Australia, 1958 Act, article 213; China, 1986 Rules, article 11(3); France, Code, article L213-6; Japan, 1951 Order, article 59(1)-(3); Republic of Korea, 1993 Decree, article 76; Madagascar, 1994 Decree, article 17, 1962 Law, article 5; Malaysia, 1959-1963 Act, articles 47-48, 48A; Nigeria, 1963 Act, articles 22(3), 40; Sweden, 1989 Act, sections 9.2-3; and United States, INA, sections 241(c)(3), (e)(1), (3)(B), (f), 252(b), 254(c).

[1733] A State may likewise deny any legal responsibility to the transporter with respect to the alien's removal (Chile, 1975 Decree, article 11; and Japan, 1951 Order, article 59).

[1734] Argentina, 2004 Act, article 43(c); Sweden, 1989 Act, section 9.2; and United States, INA, section 254(c).

[1735] Argentina, 2004 Act, article 68; Australia, 1958 Act, articles 210, 212; Belarus, 1999 Council Decision, articles 11, 23-26, 1998 Law, article 34; Bosnia and Herzegovina, 2003 Law, article 65(1); China, 1992 Provisions, articles III(iv), VII; Russian Federation, 2002 Law No. 115-FZ, article 31(5); and Sweden, 1989 Act, section 9.1.

[1736] Australia, 1958 Act, article 221(2); Belarus, 1999 Council Decision, articles 11, 23-24, 27, 1998 Law, article 34; Bosnia and Herzegovina, 2003 Law, article 65(2)-(3), (5); China, 1992 Provisions, articles III(iv), VII; Czech Republic, 1999 Act, section 123; France, Code, article L532-1; Hungary, 2001 Act, article 44(5); Iran, 1931 Act, article 11; Republic of Korea, 1992 Act, articles 90, 90-2(2); Nigeria, 1963 Act, articles 22(3), 34, 39, 42; Panama, 1960 Decree-Law, article 18; Paraguay, 1996 Law, article 112(3); Russian Federation, 2002 Law No. 115-FZ, article 31(5)-(6); Switzerland, 1999 Ordinance, articles 13, 15a-c, 1909 Federal Decree, articles 1-2; and United States, INA, section 241(e)(1)-(2), (3)(A), (C), (f).

[1737] Italy, 1998 Decree-Law No. 286, articles 10(3), 14(1), (5), (5*bis*), 16(7), 1998 Law No. 40, article 8(3); and Panama, 1960 Decree-Law, article 59. A State may take steps to ascertain the identity and origin of an alien who lacks documents or other proof of identity (Italy, 1996 Decree-Law, article 7(3)). A State may restrict the movements of the alien during such a process (Italy, 1996 Decree-Law, article 7(3)).

acquisition of such documents.[1738] A State may deprive the alien of travel documents during (1) the pendency of a request for a residence permit made after the alien has entered the State's territory;[1739] (2) the expulsion process, unless the alien agrees voluntarily to depart;[1740] or (3) the deportation process.[1741]

4. Refusal to admit

743. Some national laws regulate the situation of an alien expelled who would be refused by the State of destination. In such a case, the expelling State may revoke the deportation order, but reserve the right to issue a further order.[1742] If no State is willing to receive the alien, or the alien cannot otherwise return to any State, the expelling State may grant the alien a temporary residence permit,[1743] or detain the alien and attempt to arrange for a State to accept the alien.[1744]

5. Cooperation agreements

744. Attention has been drawn to the practical problems that may arise with respect to the expulsion of aliens even when the State of destination is the State of nationality and how States have attempted to address such problems by means of international agreements.

> "Normally the question of choice does not arise. Only the State of nationality has to be reckoned with. No other State may be willing to admit the individual; in fact often even the State of nationality, although under an international obligation to do so, is reluctant because of policy considerations. Accepting a national back from the country where he or she attempted to migrate for reasons of economic necessity may look like cooperating with the expelling State in a way which is unpopular. To make matters worse for the expelling State, identity and nationality may be hard to establish, mainly because of the alien's interest in not providing accurate information, precisely in order to make expulsion more difficult.
>
> "This practical hurdle to expulsion has been partly overcome through cooperation agreements that have been concluded by the States of immigration with the States of origin of illegal immigrants. Conclusion of these agreements has been made possible by financial and

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[1738] Austria, 2005 Act, article 3.46(2); Italy, 1998 Decree-Law No. 286, article 14(1), (5), 1996 Decree-Law, article 7(3); and Switzerland, 1999 Ordinance, article 9.

[1739] Sweden, 1989 Act No. 529, section 5.3.

[1740] Bosnia and Herzegovina, 2003 Law, article 43(4).

[1741] Sweden, 1989 Act No. 529, section 5.3.

[1742] Australia, 1958 Act, article 220(1)-(2).

[1743] France, Code, article L523-3.

[1744] United States, INA, section 507(b)(2)(C).

other incentives, including the establishment of a quota for regular immigration from a certain country. A detailed survey of existing admission agreements would be impracticable in the present context. The model agreement approved by the Council of Ministers of the European Union, which has become more relevant in view of the competence given by the Treaty of Amsterdam to the European Community with regard to immigration, may suffice as an example.

"The model agreement in question requires readmission by a Contracting Party, at the request of the other Contracting Party, of 'persons who do not, or who no longer, fulfil the conditions in force for entry or residence on the territory of the requesting Contracting Party provided that it is proved or may be validly assumed that they possess the nationality of the requested Contracting Party'. A further obligation concerns third-country nationals; this is imposed on the Contracting Party 'via whose external frontier a person can be proved, or validly assumed, to have entered who does not meet, or who no longer meets, the conditions in force for entry or residence on the territory of the requesting Contracting Party'. Only few agreements that have so far been concluded by EC Member States provide for readmission of third-country nationals. One example is given by an agreement between Italy and Albania; however, immigrants from countries bordering Albania are excluded."[1745]

[1745] Giorgio Gaja, note 28 above, p. 294 (citing, *inter alia*, model agreement, Council Recommendation of 30 November 1994, *Official Journal of the European Communities* (1996) C 274 at 20; and Agreement between Italy and Albania of 18 November 1997, 81 *R.D.L* (1998) 1226). "It is generally accepted that the State of nationality is obliged to receive the alien, although both France and Germany have concluded a number of bilateral treaties expressly to govern the return of those expelled. ...In France, known as 'conventions de prise en charge de personnes à la frontière: Batiffol and Lagarde, op. cit., p. 198; in the Federal Republic, as 'Ubernahme-' or 'Schubabkommen'; *AuslG.* Article 22; Schiedermair, op. cit., pp. 178, 227 ff." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 255 and n. 3.

X. SPECIAL CONSIDERATIONS FOR SPECIFIC CATEGORIES OF ALIENS

A. Illegal aliens

1. General limitations

(a) Traditional limitations

745. Traditional limitations which may affect the expulsion of aliens, such as the prohibition of arbitrariness and abuse of rights, as well as the principle of good faith, would seem to apply to the expulsion of illegal aliens. The Special Rapporteur on the rights of non-citizens, David Weissbrodt, pointed out that States may not exercise arbitrarily their right to require the departure of immigrants unlawfully present in their territory. He also pointed out that illegal immigrants shall not be treated as criminals:

> "There is a significant scope for States to enforce their immigration policies and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may not be exercised arbitrarily. A State might require, under its laws, the departure of persons who remain in its territory longer than the time allowed by limited-duration permits. Immigrants and asylum-seekers, even those who are in a country illegally and whose claims are not considered valid by the authorities, should not be treated as criminals."[1746]

(b) Contemporary limitations

746. Contemporary limitations which may affect the expulsion of aliens, such as the principle of non-discrimination and the principle of legality, would also seem to apply to the expulsion of illegal aliens. The Parliamentary Assembly of the Council of Europe has indicated that the principle of non-discrimination based on religion as well as the principle of legality apply with respect to the grounds for the expulsion of illegal aliens:

> "An alien without a valid residence permit may be removed from the territory of a member state only on specified legal grounds which are other than political or religious."[1747]

> "The grounds for expulsion shall be established limitatively by law."[1748]

747. In the case *Mary Carpenter v. Secretary of State for the Home Department*, the Court of Justice of the European Communities recognized that the expulsion of an alien whose entry or presence was illegal must be "in accordance with the law". [1749]

[1746] The rights of non-citizens, note 460 above, para. 29 (citations omitted).

[1747] Council of Europe, note 607 above, para. 9.

[1748] Ibid., para. 10.

[1749] Court of Justice of the European Communities, *Mary Carpenter v. Secretary of State for the Home Department*, Case C-60/00, Judgment of the Court, 11 July 2002, para. 42 (quoted below).

2. Grounds and other considerations relating to the expulsion decision

(a) Grounds

748. The requirement of a valid ground for the expulsion of aliens would apply to illegal aliens. In the case *Mary Carpenter v. Secretary of State for the Home Department*, the Court of Justice of the European Communities recognized that the expulsion of an alien whose entry or presence was illegal must be "motivated by one or more of the legitimate aims".[1750] As discussed previously, illegal entry or presence in the territory of a State may constitute a valid ground for the expulsion of an alien.[1751]

749. As noted above, the Parliamentary Assembly of the Council of Europe has indicated that illegal aliens cannot be expelled on political grounds.[1752]

(b) Human rights considerations

750. The human rights considerations which may affect the expulsion of aliens may also apply to some extent to illegal aliens. International human rights law normally provides protection to all individuals within the jurisdiction of the State and, therefore, also to illegal aliens. The majority of rules contained in human rights treaties would apply to illegal aliens as human beings irrespective of the illegal nature of their presence in the territory of the State.[1753] Illegal aliens would be in a similar

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[1750] Ibid.(quoted below).

[1751] *See* Part VII.A.6(a) and (b).

[1752] Council of Europe, note 607 above, para. 9.

[1753] *See*, in particular, article 2, para. 1 of the International Covenant on Civil and Political Rights ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); article 1 of the European Convention on Human Rights ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."); and article 1, para. 1, of the American Convention on Human Rights ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.") The following precisions have been given by the Human Rights Committee in relation to the scope of application of the International Covenant on Civil and Political Rights: "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. […]" (Human Rights Committee (International Covenant on Civil and Political Rights), General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, position with respect to the rules formulated by the General Assembly in its Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, annexed to resolution 40/144.[1754]

751. The Court of Justice of the European Communities has taken into account human rights considerations in determining the lawfulness of the expulsion of an alien whose continuing presence in the State was illegal. In the case *Mary Carpenter v. Secretary of State for the Home Department*, the Court held that the deportation from the United Kingdom of Mrs. Carpenter was an interference with her husband's right to respect for his family life as provided for in article 8, paragraph 1, of the European Convention on Human Rights. The Court, while recognizing that Mrs. Carpenter had infringed the United Kingdom's immigration laws by overstaying in the territory of that country, considered that her deportation did not appear to be "necessary in a democratic society", since nothing in her behaviour could be seen as representing a threat to public order or public safety.

> "39. It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be

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CCPR/C/21/Rev.1/Add.13. (General Comments), para. 10.) Attention may also be drawn to the position taken by the European Court of Human Rights with respect to the scope of application of the European Convention on Human Rights, as defined in its article 1. In the *Bankovic case*, the Court held that the Convention was applicable to all individuals who are in the territory of the State, even though they do not reside therein "in a legal sense" (*Bankovic and others v. Belgium and other 16 Contracting States*, Decision of 12 December 2001, Application number 52207/99, para. 63).

[1754] The only rights that, according to this Declaration, belong only to aliens lawfully present in the territory of the State are the procedural guarantees specifically applicable to expulsion according to article 7 – which are identical to those provided for in article 13 of the International Covenant on Civil and Political Rights ("An alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled and to have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority. Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited.') and the rights enumerated in article 10 (1. Aliens lawfully residing in the territory of a State shall also enjoy, in accordance with the national laws, the following rights, subject to their obligations under article 4: (a) The right to safe and healthy working conditions, to fair wages and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (b) The right to join trade unions and other organizations or associations of their choice and to participate in their activities. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary, in a democratic society, in the interests of national security or public order or for the protection of the rights and freedoms of others; (c) The right to health protection, medical care, social security, social services, education, rest and leisure, provided that they fulfil the requirements under the relevant regulations for participation and that undue strain is not placed on the resources of the State. 2. With a view to protecting the rights of aliens carrying on lawful paid activities in the country in which they are present, such rights may be specified by the Governments concerned in multilateral or bilateral conventions.").

deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse […]

"40. A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures […]

"41. The decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter the Convention), which is among the fundamental rights which, according to the Court's settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community law.

"42. Even though no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that article, that is unless it is in accordance with the law, motivated by one or more of the legitimate aims under that paragraph and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, in particular, Boultif v Switzerland, no. 54273/00, §§ 39, 41 and 46, ECHR 2001-IX).

"43. A decision to deport Mrs Carpenter, taken in circumstances such as those in the main proceedings, does not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and public safety.

"44. Although, in the main proceedings, Mr Carpenter's spouse has infringed the immigration laws of the United Kingdom by not leaving the country prior to the expiry of her leave to remain as a visitor, her conduct, since her arrival in the United Kingdom in September 1994, has not been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety. Moreover, it is clear that Mr and Mrs Carpenter's marriage, which was celebrated in the United Kingdom in 1996, is genuine and that Mrs Carpenter continues to lead a true family life there, in particular by looking after her husband's children from a previous marriage.

"45. In those circumstances, the decision to deport Mrs Carpenter constitutes an infringement which is not proportionate to the objective pursued.

"46. In view of all the foregoing, the answer to the question referred to the Court is that Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country."[1755]

3. Procedural requirements

752. As discussed previously, article 13 of the International Covenant on Civil and Political rights sets forth procedural guarantees only with respect to the expulsion of aliens lawfully present in the territory of a State.[1756] However, the Human Rights Committee has considered that the guarantees of this provision should also apply to a decision concerning the legality of an alien's entry or stay in the territory of the State:

> "[…] The particular rights of article 13 [of the International Covenant on Civil and Political Rights] only protect those aliens who are lawfully in the territory of a State party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permit allow, in particular, are not covered by its provisions. However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13. […]"[1757]

753. The African Commission on Human and Peoples' Rights held that the right to legal redress must also be granted to illegal immigrants in the event of their expulsion:

> "The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is however of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter and international law."[1758]

4. Departure

754. With respect to the manner in which the expulsion of an illegal alien is enforced, it should be noted that States must respect the fundamental human rights of the individual, such as the prohibition

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[1755] Court of Justice of the European Communities, note 1749 above.

[1756] *See* Part VIII.

[1757] Human Rights Committee (International Covenant on Civil and Political Rights), General Comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, para. 9.

[1758] African Commission on Human and Peoples' Rights, note 368 above, para. 20.

of torture or inhuman treatment. In this respect, Ms. Gabriela Rodríguez Pizarro, Special Rapporteur on the human rights of migrants, emphasized that:

> "[…] expulsion, deportation or repatriation of illegal immigrants should be carried out with respect and dignity."[1759]

5. Exclusion from certain treaty provisions

755. It should also be noted that several treaties provide specific guarantees in relation to the expulsion of aliens which apply only to aliens lawfully present in the territory of a State. Such is the case of treaty provisions concerning aliens in general[1760] as well as treaty provisions concerning specific categories of aliens, such as migrant workers,[1761] refugees[1762] or stateless persons.[1763]

B. Resident aliens

1. General considerations

756. Resident aliens who have a right to reside in the State or who have in fact resided in the State for a considerable period of time may be entitled to special consideration with respect to expulsion as a matter of treaty law and international jurisprudence. The position of resident aliens with respect to expulsion under national law and jurisprudence is inconsistent.

757. In the *Rankin vs. The Islamic Republic of Iran* case, the Iran-United States Claims Tribunal considered the expulsion of aliens who had a right to reside in the territory of the State under an applicable treaty. The Tribunal stated as follows:

> "The implementation of this policy could, in general terms, be violative of both procedural and substantive limitations on a State's right to expel aliens from its territory, as

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[1759] Commission on Human Rights, Migrant Workers, Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2004/53, E/CN.4/2005/85, 27 December 2004, para. 75.

[1760] *See*, in particular, article 13 of the International Covenant on Civil and Political Rights; article 22, para. 6, of the American Convention on Human Rights; article 12, para. 4, of the African Charter on Human and Peoples' Rights; Article 3 of the European Convention on Establishment; and article 1, para. 1, of Protocol No. 7 to the European Convention on Human Rights.

[1761] *See* article 56 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, reproduced in Part X.C.1(b).

[1762] *See* article 32 of the Convention relating to the Status of Refugees (*see* Part X.E).

[1763] *See* article 31 of the Convention relating to the Status of Stateless Persons (*see* Part X.F.).

> found in the provisions of the Treaty of Amity and in customary international law. […] For example, by expelling an alien who had a continued right to residency in Iran …"[1764]

758. The relevant legislation of the European Union pays particular attention to the expulsion of resident aliens. With respect to the expulsion of citizens of the European Union, article 28 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 mentions the duration of residence in the host country as a relevant factor to be taken into consideration:

> "1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as *how long the individual concerned has resided on its territory,* his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin. ..." [Emphasis added.]

759. Third-country nationals who are long-term residents are also granted special protection against expulsion in accordance with Council Directive 2003/109/EC of 25 November 2003.[1765]

760. The national laws of States may[1766] or may not[1767] provide special treatment to resident aliens or apply certain substantive provisions exclusively to resident aliens.[1768] Also, a State may void a deportation order if it is not enforced before the alien obtains a permanent residence permit.[1769]

761. There is a similar inconsistency in the national jurisprudence of States. Although, in some cases, limitations have been imposed on the right to expel resident aliens,[1770] the right of the territorial

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[1764] *Rankin v. The Islamic Republic of Iran*, note 136 above, p. 147, para. 30 and n. 20.

[1765] European Union, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, *Official Journal L 16*, pp. 44-53. According to articles 2 and 4 of this Directive, a third-country national may acquire long-term resident status after five years of legal and continuous residence.

[1766] Argentina, 2004 Act, article 62; Bosnia and Herzegovina, 2003 Law, article 47(3); Canada, 2001 Act, article 41; France, Code, article L541-1; Spain, 2000 Law, article 57(5)(b); Sweden, 1989 Act, sections 2.10, 4.10; United Kingdom, 1971 Act, section 7(2); and United States, INA, sections 210(a)(3), 212(a)(9)(B).

[1767] Czech Republic, 1999 Act, section 79.

[1768] Belarus, 1998 Law, article 15; Finland, 2004 Act, sections 143, 168; Republic of Korea, 1992 Act, article 46(2); Sweden, 1989 Act, sections 2.12, 2.14; and United States, INA, sections 101(a)(13)(C), 240A(a)-(b).

[1769] Canada, 2001 Act, article 51.

[1770] *In re Rojas et al.*, Supreme Court of Costa Rica, 26 July 1938, *Annual Digest and Reports of Public International Law Cases*, 1938-1940, H. Lauterpacht (ed.), Case No. 140, pp. 389-390 ("The laws which restrict immigration cannot be applied to foreigners who by reason of their being in the country for a considerable time must be considered as inhabitants of the Republic and consequently protected in those rights which the Constitution guarantees. When the immigrant is not rejected on disembarking or on crossing the frontier, or within a reasonable time … there is no way of applying to him the immigration laws without disregard of the

State to expel such aliens has also been affirmed in a number of cases.[1771] In 1952, the United States Supreme Court upheld the power to expel resident aliens notwithstanding the severe consequences for the individuals concerned. The Court stated as follows:

> "That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defence and reprisal confirmed by international law as a power inherent in every sovereign State. … Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it."[1772]

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fundamental precepts which are the guarantees of the foreigner resident in Costa Rica."); *Banda v. Belgian State (Minister of Justice)*, Belgium, Conseil d'État, 22 May 1959, *International Law Reports*, volume 43, 1971, E. Lauterpacht (ed.), pp. 229-231 ("Under the terms of Article 4, C, of the Law of 28 March 1952, the Minister of Justice is obliged to consult the Advisory Committee on Aliens only prior to the expulsion of an alien holding a permit authorizing him to establish his domicile here. The petitioner, having lost the benefit of this permit through a prolonged absence from the Kingdom, could, notwithstanding subsequent recognition of his refugee status, be ordered to leave the country by the Minister of Justice without prior consultation with the Advisory Committee.").

[1771] *Banda v. Belgian State (Minister of Justice)*, Belgium, Conseil d'État, 22 May 1959, *International Law Reports*, volume 43, 1971, E. Lauterpacht (ed.), pp. 229-231 ("Under the terms of Article 4 of the Law of 28 March 1952 the King may expel an alien who has obtained a permit authorizing him to establish his domicile in the Kingdom when he judges his presence dangerous or harmful to public safety or the security of the country"); *Salebhoy v. The Controller of Immigration*, Burma, Chief Court, 24 January 1963, *International Law Reports*, volume 36, E. Lauterpacht (ed.), pp. 345-350 ("In advancing his first argument, Mr. Basu is unable to refer me to any provision of law which says clearly that a man such as his client, who has resided in Burma continuously for a specified period of years before specified dates, has a vested right to stay permanently in the country, immune from any action on the part of the Government to expel him."); *In re Barahona*, Supreme Court of Costa Rica, 10 August 1939, *Annual Digest and Reports of Public International Law Cases*, 1938-1940, H. Lauterpacht (ed.), Case No. 138, pp. 386-388 ("As Article 5 of that Convention provides that States may, for reasons of order or public safety, expel even a domiciled foreigner without any restriction, it is not possible to subordinate such unrestricted power of the later law to the limitations of the former decree. Nor can there be in any case a curtailment of the wide rights of judgment and action which laws grant to the Executive in the international sphere. The doctrine of public law follows closely the principle that foreigners are obliged to respect the juridical order of the country in which They Live"). But see *Gianotis v. Minister of Justice*, Belgium, Conseil d'État, 21 March 1952, *International Law Reports*, 1952, H. Lauterpacht (ed.), Case No. 70, pp. 350-352 ("Accordingly, on the basis of the Law of September 28, 1939, no order of expulsion can be made or executed with respect to an alien who, as in this case, is a national of a country at peace with Belgium, has been resident in Belgium for more than five years, and continues to reside there on a permanent basis."); *In re Everardo Diaz*, Brazil, Supreme Federal Tribunal, 8 November 1919, *Annual Digest of Public International Law Cases*, 1919-1922, Sir John Fischer Williams and H. Lauterpacht (eds.), Case No. 179, pp. 254-257 ("Except when there is a law to the contrary, the time of residence, however long, did not prevent the application of this right of expulsion."). But see *Re Sosa*, Argentina, Supreme Court, 23 March 1956, *International Law Reports*, 1956, H. Lauterpacht (ed.), pp. 395-397 ("In conclusion, Sosa must be regarded as a resident of this country who must be granted the guarantee of permanent residence in conformity with the provisions of Article 26 of the National Constitution. Both the denial of his request for permanent residence and the subsequent renewal of the deportation proceedings are contrary to law. The judgment under appeal is reversed and *habeas corpus* is granted."); *Homeless Alien (Germany) Case*, note 702 above ("Expulsion without the grounds of national security and public order being present, as provided in Article 32(1), however, is no longer possible where the refugee has been lawfully living here for some years.").

[1772] *Harisiades v. Shaughnessy*, United States Supreme Court, 10 March 1952 *International Law Reports*, 1952, H. Lauterpacht (ed.), Case No. 69, pp. 345-350 (citations omitted). See also *Demore v. Kim*, United States Supreme

2. Grounds and other considerations relating to the expulsion decision

(a) Grounds

762. Resident aliens may be given special consideration with respect to the determination of the existence of grounds for their expulsion in two respects. First, the grounds for the expulsion of resident aliens may be limited. Second, it may be necessary to take into account special factors relating to resident aliens in determining the existence of grounds for expulsion.

763. Article 3 of the European Convention on Establishment sets forth strict requirements concerning the grounds for the expulsion of an individual who is a national of a Contracting Party and has been lawfully residing for more than ten years in the territory of another Contracting Party. Such a person may only be expelled for reasons of national security, or for reasons of *ordre public* or morality which are "of a particularly serious nature". Article 3, paragraphs 1 and 3, provides as follows:

> "1. Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against *ordre public* or morality. […]
>
> "3. Nationals of any Contracting Party who have been lawfully residing for more than ten years in the territory of any other Party may only be expelled for reasons of national security or if the other reasons mentioned in paragraph 1 of this article are of a particularly serious nature."

764. Section I(b) of the Protocol to the European Convention on Establishment provides guidance concerning the requirement that the reasons for the expulsion of resident aliens be of a "particularly serious nature". The Protocol indicates that the behaviour of the individual during the entire period of residence must be taken into account in determining whether such reasons exist. Section I b provides as follows:

> "Each Contracting Party shall determine whether the reasons for expulsion are of a 'particularly serious nature'. In this connection account shall be taken of the behaviour of the individual concerned during his whole period of residence."

765. Furthermore, section III(c) of the same protocol provides that States Parties shall take into consideration, when adopting an expulsion measure, the period of residence of the person concerned:

> "[…] The Contracting Parties shall, in exercising their right of expulsion, act with consideration, having regard to the particular relations which exist between the members of

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Court, 538 U.S. 510, 123 S.Ct. 1708, 155 L.Ed.2d 724, 29 April 2003 [No. 01-1491] (reversing the judgement of the Court of Appeals for the Ninth Circuit granting habeas corpus relief to a detainee awaiting removal from the United States on the basis of a lack of a finding of dangerousness and the detainee's status as a resident alien).

the Council of Europe. They shall in particular take due account of family ties and the period of residence in their territory of the person concerned."

766. The Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union also restricts the possible grounds for the expulsion of resident aliens who have been established for three years in the expelling State. Article 5 provides as follows:

> "Nationals of any Contracting Party who have been established for three years in the territory of another Contracting Party may be expelled only if they constitute a threat to national security or if, having been finally sentenced for a particularly serious crime or offence, they constitute a threat to the community in that country." [1773]

767. The European Union provides for special consideration with respect to the expulsion of citizens of the Union who are long-term residents. Article 28 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 grants special protection to Union citizens who possess the right of permanent residence in the territory of the State, by allowing their expulsion only on "*serious* grounds of public policy or public security". Moreover, aliens who have resided in the country for the previous ten years may only be expelled "on *imperative* grounds of public security": Article 28, paragraphs 2 and 3(a), provides as follows:

> "2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
>
> "3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
>
> (a) have resided in the host Member State for the previous 10 years;"[1774]

768. The European Union also provides for special consideration with respect to the expulsion of third country nationals who are long-term residents. Council Directive 2003/109/EC of 25 November 2003 indicates that long-term resident aliens may be expelled only on grounds relating to "an actual and sufficiently serious threat to public policy or public security". The expulsion of such aliens on economic grounds is expressly precluded. Article 12 of the Directive provides as follows:

[1773] Convention of Application of Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union, Brussels, 19 September 1960, United Nations, *Treaty Series*, vol. 480, No. 5471, p. 424 at p. 432.

[1774] See also the preambular paragraph 24 of the same directive, which indicates: "Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. [...]"

"1. Member States may take a decision to expel a long-term resident solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security.

"2. The decision referred to in paragraph 1 shall not be founded on economic considerations. […]"[1775]

769. The European Union also requires consideration of special factors in deciding whether there are grounds for the expulsion of third country nationals who are long-term residents. Council Directive 2003/109/EC of 25 November 2003 requires consideration of the following factors in such cases: (1) duration of the residence of the alien, (2) the age of the alien, (3) the consequences of the expulsion for the alien and family members, and (4) the comparative links between the alien and the States concerned. Article 12, paragraph 3, provides as follows:

"3. Before taking a decision to expel a long-term resident, Member States shall have regard to the following factors:

"a) the duration of residence in their territory;

"b) the age of the person concerned;

"c) the consequences for the person concerned and family members;

"d) links with the country of residence or the absence of links with the country of origin."[1776]

[1775] European Union, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, *Official Journal L 16*, pp. 44-53. According to articles 2 and 4 of this Directive, a third-country national may acquire long-term resident status after five years of legal and continuous residence. See also Council Resolution of 4 March 1996 on the status of third country nationals residing on a long-term basis in the territory of the Member States, *Official Journal C 080*, 18 March 1996, pp. 2-4: "VI. It should be possible for a residence authorization granted to a long-term resident to be cancelled or not renewed on one of the following grounds: - the fact that an expulsion measure has been issued against the long-term resident in accordance with the provisions of the legislation of the Member State concerned, *on the understanding that such resident enjoys, with respect to the expulsion measure taken concerning him, the maximum legal protection provided for in the legislation of the said Member State, in accordance with procedures guaranteeing that due account is taken of the lengths of his period of legal residence.* Where the expulsion measure was adopted for reasons of public policy, these should be based on the personal behaviour of the long-term resident involving a sufficiently serious threat to public policy, or to national security; […] - the residence authorization has proved to have been obtained by means of fraud." [Emphasis added.]

[1776] European Union, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, *Official Journal L 16*, pp. 44-53. According to articles 2 and 4 of this Directive, a third-country national may acquire long-term resident status after five years of legal and continuous residence.

770. The Parliamentary Assembly of the Council of Europe has characterized the expulsion of long-term residents as both disproportionate and discriminatory. In this regard, Recommendation 1504 (2001) provides as follows:

> "3. The application of expulsion measures against them seems both disproportionate and discriminatory: disproportionate because it has lifelong consequences for the person concerned, often entailing separation from his/her family and enforced uprooting from his/her environment, and discriminatory because the state cannot use this procedure against its own nationals who have committed the same breach of the law. […]
>
> "5. The Assembly notes with concern that legal rules on expulsion without a time frame are being misused and regrets the fact that the European Court of Human Rights has not adopted any clear stance on the expulsion of long-term immigrants. This deprives them of the certainty of the law to which they are entitled in a law-based state.
>
> […]
>
> "The Assembly recommends that the Committee of Ministers:
>
> "i) invite the governments of member states:
>
> "a) to recognise that the expulsion of a long-term immigrant is a disproportionate and discriminatory sanction;
>
> "b) to recognise that the threat of expulsion constitutes an obstacle to the integration of long-term immigrants …"

771. The Parliamentary Assembly of the Council of Europe has also indicated that in no case shall an expulsion be adopted against an alien who was born or brought up in the host country, nor against under-aged children. The Parliamentary Assembly has recommended that the Committee of Ministers invite the governments of member states: "to guarantee that migrants who were born or raised in the host country and their under-age children cannot be expelled under any circumstances". Recommendation 1504 (2001), paragraph 7, provides as follows:

> "7. Under no circumstances should expulsion be applied to people born or brought up in the host country or to under-age children."

772. The Parliamentary Assembly of the Council of Europe has also indicated that persons who were lawful residents in a State prior to its independence should not be subject to expulsion. Recommendation 1504 (2001), paragraph 8, provides as follows:

> "8. Those persons who were lawful residents in a country prior to establishment or restoration of the independence of that country should enjoy at least the same level of protection as long-term immigrants and, in particular, under no circumstances be expelled."

773. The Parliamentary Assembly of the Council of Europe has expressed the view that a long-term migrant should be expelled only in highly exceptional cases, if he or she "represents a real danger to the State". Recommendation 1504 (2001), paragraph 10, provides as follows:

> "10. The Assembly considers that expulsion may be applied only in highly exceptional cases, and when it has been proven, with due regard to the presumption of innocence, that the person concerned represents a real danger to the state.
>
> […]
>
> "The Assembly recommends that the Committee of Ministers:
>
> "i) invite the governments of member states:
>
> […]
>
> "d) to recognise that expelling persons on public order grounds, where their guilt has not been legally established, is contrary to the principle of presumption of innocence;
>
> […]
>
> "f) to ensure that offences committed by long-term migrants which constitute a threat to or violation of public order are defined and penalised under criminal law in the same way as for nationals;
>
> "g) to take the necessary steps to ensure that in the case of long-term migrants the sanction of expulsion is applied only to particularly serious offences affecting state security of which they have been found guilty …"[1777]

774. Moreover, the Parliamentary Assembly of the Council of Europe has emphasized the importance of a detailed examination of specific factors relating to resident aliens in determining whether there are sufficient grounds for expulsion, including the humanitarian situation of the individuals concerned and the consequences of an expulsion for the individuals and their families. Recommendation 1504 (2001), paragraph 8 (i), recommends that the Committee of Ministers invite the governments of member states:

> "i) to ensure that persons facing expulsion can secure detailed examination of their humanitarian situation in order to highlight the consequences of their possible expulsion for themselves and their families and, if appropriate, to adopt alternative measures …"[1778]

[1777] Council of Europe, Parliamentary Assembly, Recommendation 1504 (2001): Non-expulsion of long-term immigrants, 14 March 2001.

[1778] Ibid.

775. As early as 1892, the Institut de Droit international formulated special requirements concerning the grounds which may justify the expulsion of an alien domiciled in the expelling State. The Institut restricted such grounds to those related to "serious offences against public safety", "attacking, either in the press or by some other means, a foreign State or sovereign or the institutions of a foreign State", "attacks or insults published in the foreign press against the State", threat to national security in times of (imminent) war and, under certain conditions, conviction or prosecution abroad for serious offences. Article 40 of the Règles internationales sur l'admission et l'expulsion des étrangers provides as follows:

> "Aliens domiciled in the territory may not be expelled except under the provisions of article 28, paragraphs 7 to 10,[1779] and under paragraph 6 of said article,[1780] only if the sentences handed down abroad have not been fully served or remitted, or if the sentence by a foreign court was handed down after they settled in the country."[1781]

776. National laws may specify the grounds that may lead to the expulsion of a resident alien. For example, a State may cancel the permit of a resident alien if the alien violates certain conditions of stay, is engaged in certain criminal activities, or presents a threat to the State's *ordre public*, national security or interests.[1782]

777. National laws may also provide that special considerations be taken into account in deciding on the expulsion of a resident alien. For example, a State may consider the length of the alien's stay in

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[1779] These paragraphs refer to: "7. Aliens who are guilty of incitement to commit serious offences against public safety even though such incitement is not in itself punishable under the territory's legislation and even though such offences were intended to be carried out only abroad; 8. Aliens who, in the territory of the State, are guilty or are strongly suspected of attacking, either in the press or by some other means, a foreign State or sovereign or the institutions of a foreign State, provided that such acts, if committed abroad by nationals and directed against the State itself, are punishable under the law of the deporting State; 9. Aliens who, during their stay in the territory of the State, are guilty of attacks or insults published in the foreign press against the State, the nation or the sovereign; 10. Aliens who, in times of war or when war is imminent, imperil the security of the State by their conduct."

[1780] This paragraph refers to: "Aliens who have been convicted or are subject to prosecution abroad for serious offences which, according to the legislation of the country or under extradition agreements entered into by the State with other States, could give rise to their extradition".

[1781] *Règles internationales* note 56 above, article 40.

[1782] China, 2003 Law, article 24; Czech Republic, 1999 Act, section 87(a)(1); France, Code, articles L521-2(3)-(4), L521-3(1)-(2); and Sweden, 1989 Act, section 4.10.

the State,[1783] or whether the alien comes from a State having a special arrangement or relationship with the expelling State.[1784]

778. In 1961, the Administrative Court of Appeal of the Land of North Rhine-Westphalia considered the valid grounds for the expulsion of resident aliens. The Court stated as follows:

> "By international law a State is free to decide whether or not it wishes to receive a foreign national in its territory. However, once it has received him, the foreign national acquires a certain status of which he cannot be deprived without some reason. Article 3 (3) of the European Convention on Establishment of December 13, 1955, to which the Federal Republic has acceded by Law dated September 30, 1959, provides – in accordance with this rule of international law – that nationals of the Contracting Parties who have had their ordinary residence in the territory of one of the Contracting States for more than ten years may be expelled only for reasons affecting the security of the State or on the ground of preservation of public order and morality. It is true that, as far as the Federal Republic is concerned, this Convention is not yet in force, but the general legal principle of making it more difficult for States to expel foreign nationals who have been resident for a long time is in conformity with a general principle of international law according to which an expulsion must be justifiable on specific and weighty grounds. To this extent the discretion of the State of residence to expel foreign nationals is limited, even in the absence of treaties governing the right of residence. This general rule, according to Article 25 of the Constitution, forms part of federal law and must therefore be observed by the German authorities. When making an order prohibiting a foreigner from residing in federal territory, the competent authority has to take into account the long period of time during which the person concerned has been resident in the territory. To this extent its discretion is limited."[1785]

(b) Human rights considerations

779. The Committee on the Elimination of Racial Discrimination has emphasized the importance of avoiding disproportionate inference with the right of the family with respect to the expulsion of resident aliens. General recommendation XXX provides as follows:

[1783] Argentina, 2004 Act, article 62; Australia, 1958 Act, articles 201(b), 204(1)-(2); Austria, 2005 Act, article 3.54(2)-(5); Bosnia and Herzegovina, 2003 Law, article 48; Denmark, 2003 Act, article 22; France, Code, articles L511-4(3)-(5), (8), L521-2(3)-(4), L521-3(1)-(2), L541-1; Italy, 1996 Decree Law, article 7(3); Paraguay, 1996 Law, article 82; Portugal, 1998 Decree-Law, article 109(a)-(b); Spain, 2000 Law, article 57(5)(a); Sweden, 1989 Act, section 4.10; United Kingdom, 1971 Act, section 7(1)(b)-(c), (3)-(4); and United States, INA, section 216A(b)(1)(A), 240A(b)(1)(A), (2)(A)(ii), (d). *Compare* Guatemala, 1986 Decree Law, article 87, which establishes that the alien's long-term presence in the State's territory shall not affect the alien's deportation.

[1784] United Kingdom, 1971 Act, section 7(1), (3)-(4).

[1785] *Expulsion of Foreign National (Germany) Case,* Federal Republic of Germany, Administrative Court of Appeal of the Land of North Rhine-Westphalia, 16 May 1961, *International Law Reports*, volume 32, E. Lauterpacht (ed.), pp. 255-257.

> "[a]void expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life".[1786]

3. Procedural requirements

780. Resident aliens who are subject to expulsion may be entitled to special procedural guarantees under international treaty law or national law.

781. The European Convention on Establishment entitles aliens who have been lawfully residing in the expelling State for more than two years to a right to appeal against their expulsion to a competent authority. Article 3, paragraph 2, provides as follows:

> "Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority."

782. Within the European Union, Council Directive 2003/109/EC of 25 November 2003[1787] sets forth procedural guarantees for the expulsion of a third country national who is a long-term resident. Such a person shall be granted the right to a judicial redress as well as legal aid at the same conditions as those applicable to the nationals of the expelling State. The Directive provides in preambular paragraph 16 and article 12, paragraphs 4 and 5, as follows:

> "Long-term residents should enjoy reinforced protection against expulsion. This protection is based on the criteria determined by the decisions of the European Court of Human Rights. In order to ensure protection against expulsion Member States should provide for effective legal redress".
>
> […]
>
> "4. Where an expulsion decision has been adopted, a judicial redress procedure shall be available to the long-term resident in the Member State concerned.
>
> "5. Legal aid shall be given to long-term residents lacking adequate resources, on the same terms as apply to nationals of the State where they reside."

[1786] Committee on the Elimination of Racial Discrimination, note 1164 above, para. 28.

[1787] European Union, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, *Official Journal L 16*, pp. 44-53. According to articles 2 and 4 of this Directive, a third-country national may acquire long-term resident status after five years of legal and continuous residence.

783. In its Recommendation 1504 (2001), the Parliamentary Assembly of the Council of Europe identified certain procedural requirements to be fulfilled in the expulsion of long-term residents. The recommendation insists on the following requirements: the establishment of a time-frame with regard to such expulsions; the application to long-terms residents, on a non-discriminatory basis, of the ordinary-law procedures and penalties applied to nationals who have committed the same offence; respect for the principle of the presumption of innocence; the prohibition of double punishment; as well as the right to a judicial trial, to assistance by counsel and to an appeal with suspensive effect. Articles 5 and 6 provide as follows:

> "5. The Assembly notes with concern that legal rules on expulsion without a time frame are being misused and regrets the fact that the European Court of Human Rights has not adopted any clear stance on the expulsion of long-term immigrants. This deprives them of the certainty of the law to which they are entitled in a law-based state.
>
> "6. The Assembly takes the view that an irreversible order to leave a country's territory is a penalty which ought no longer to be exercised without a time frame.
>
> [...]
>
> "The Assembly recommends that the Committee of Ministers:
>
> "i) invite the governments of member states:
>
> [...]
>
> "c) to undertake to ensure that the ordinary-law procedures and penalties applied to nationals are also applicable to long-term immigrants who have committed the same offence;
>
> "d) to recognise that expelling persons on public order grounds, where their guilt has not been legally established, is contrary to the principle of presumption of innocence;
>
> "e) to accept that expelling persons after they have served a prison sentence is a double punishment;
>
> "f) to ensure that offences committed by long-term migrants which constitute a threat to or violation of public order are defined and penalised under criminal law in the same way as for nationals;
>
> "g) to take the necessary steps to ensure that in the case of long-term migrants the sanction of expulsion is applied only to particularly serious offences affecting state security of which they have been found guilty;
>
> [...]

"j) to take the necessary steps to grant persons subject to expulsion the following procedural safeguards:

- the right to a judge;
- the right to a trial in the presence of all parties;
- the right to assistance by counsel;
- the right to an appeal with suspensive effect, because of the irreversible consequences of enforcing the expulsion …"[1788]

784. National laws may apply certain procedures exclusively to permanent residents,[1789] or otherwise provide different procedural treatment to resident aliens.[1790]

785. National courts have also recognized that resident aliens may be accorded additional procedural protections against unjustified expulsion.[1791]

[1788] Council of Europe, Parliamentary Assembly, Recommendation 1504 (2001): Non-expulsion of long-term immigrants, 14 March 2001.

[1789] United States, INA, sections 505(c)(2), 506(a)(2). Such provisions may apply specifically to a permanent resident allegedly involved in terrorism (United States, INA, sections 505(c)(2), 506(a)(2)).

[1790] Japan, 1951 Order, article 50(1)-(3); and United States, INA, section 238(b).

[1791] *Re Leiva,* Argentina, Cámara Nacional de Apelaciones de Resistencia, 20 December 1957, *International Law Reports*, 1957, H. Lauterpacht (ed.), p. 490 ("As the Supreme Court held in the cases of *Re Hernandez (Fallos de la Corte Suprema,* vol. 173, p. 179) and *Re Bar abas de Zlatnik (Revista Juridica Argentina La Ley,* vol. 12, p. 623), once an alien has been admitted into the country, he is to be treated as a resident thereof. Furthermore, he has a right to petition for a writ of habeas corpus, and the federal Courts are competent to take cognizance of such petition. After an alien has become a resident of the country, he is no longer subject to the jurisdiction of the Bureau of Immigration; but the Bureau may, however, institute proceedings against him for violation of Article 29 of Law 13.482."); *Holmes v. Belgian State (Minister of Justice)*, Belgium, Conseil d'État, 29 January 1954, *International Law Reports*, 1954, H. Lauterpacht (ed.), pp. 222-224 ("Article 5 of the Law gives special guarantees to aliens called privileged, and in particular to aliens who have been continually resident in the country for more than five years and who have married Belgian women, namely, the advice of a special consultative committee and, where appropriate, prior consideration in full Cabinet. However, that advice and consideration are required under that Article prior to any expulsion order."); *Kwong Hai Chew v. Colding et al.,* United States Supreme Court, 9 February 1953, 345 U. S. 229; 97 L.Ed. 972; 73 Sup. Ct. 603, *International Law Reports*, 1953, H. Lauterpacht (ed.), pp. 343-357 ("It is well established that if an alien is a lawful permanent resident of the United States and remains physically present here, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law. Although it later may be established, as respondents contend, that petitioner can be expelled and deported, yet before his expulsion, he is entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal. Although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard."); *Johnson* v. *Eisentrager*, United States Supreme Court, 339 U.S. 763, 770-771 (1950). ("The alien, to whom the United States has been

4. Departure

(a) Reasonable opportunity to protect property and similar interests

786. In 1892, the Institut de Droit international adopted the principle according to which the expelling State shall give domiciled or resident aliens a reasonable opportunity to settle their affairs and interests before leaving the territory of the State:

> "Deportation of aliens who are domiciled or resident or who have a commercial establishment in the territory shall only be ordered in a manner that does not betray the trust they have had in the laws of the State. It shall give them the freedom to use, directly where possible or by the mediation of a third party chosen by them, every possible legal process to settle their affairs and their interests, including their assets and liabilities, in the territory."[1792]

(b) Detention

787. The Parliamentary Assembly of the Council of Europe has taken the position that legal long-term resident aliens who are subject to expulsion should not be held in detention pending their departure. Recommendation 1504 (2001), paragraph 9, provides as follows:

> "9. The Assembly finds it totally unacceptable that legal long-term immigrants who have been sentenced to expulsion are held in prison while they await their expulsion."

C. Migrant workers and members of their families

1. General limitations

(a) Traditional limitations

788. The 1999 General Survey on Migrant Workers prepared by the International Labour Organization recognized the prohibition of arbitrary expulsion with respect to migrant workers:

> "Migrant workers and members of their families should not be subject to measures of arbitrary expulsion."[1793]

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traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. … And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties – such as the due process of law of the Fourteenth Amendment.").

[1792] *Règles internationales*, note 56 above, article 41.

[1793] International Labour Organization, General Survey on Migrant Workers, 1999, para. 560.

(b) Contemporary limitations

789. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families recognized the principle of legality with respect to the expulsion of migrant workers and their families. Article 22, paragraph 2 and article 56, paragraph 1 provide as follows:

> "Article 22
>
> […]
>
> "2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.
>
> […]
>
> "Article 56
>
> "1. Migrant workers and members of their families referred to in the present part [i.e. individuals who are documented or in a regular situation] of the Convention may not be expelled from a State of employment, except for reasons defined in the national legislation of that State …"

2. Grounds and other considerations relating to the expulsion decision

(a) Grounds

790. Treaty provisions and other international instruments contain limitations on the possible grounds for the expulsion of a migrant worker and the members of his or her family, either by specifying the admissible grounds or by prohibiting certain grounds. Treaty law also provides for the consideration of special factors with respect to the expulsion of migrant workers relating to duration of stay and family.

791. Illegal entry or presence may be a valid ground for the expulsion of a migrant worker. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families indicates that migrant workers and members of their families finding themselves in an irregular situation have no right under the Convention to the regularization of their situation. Article 35 provides as follows:

> "Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation …"

792. The European Convention on the Legal Status of Migrant Workers restricts considerably the right of a State to compel a migrant worker to leave its territory by withdrawing his or her residence

permit. In fact, such a withdrawal is only possible for reasons related to public order, national security, morals, public health or the non-fulfilment of a condition essential to the validity of the permit. Article 9, paragraph 4, provides as follows:

> "The residence permit, issued in accordance with the provisions of paragraphs 1 to 3 of this Article,[1794] may be withdrawn:
>
> "a) for reasons of national security, public policy or morals;
>
> "b) if the holder refuses, after having been duly informed of the consequences of such refusal, to comply with the measures prescribed for him by an official medical authority with a view to the protection of public health;
>
> "c) if a condition essential to its issue or validity is not fulfilled. […]"

793. National security as a ground for the expulsion of migrant workers has been dealt with under the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Termination of Employment Convention, 1982 (No. 158) adopted within the International Labour Organization. A Committee was set up to consider an allegation by Ethiopia that the expulsion of Eritrean workers was justified on grounds of national security, as mentioned in article 4 of Convention No. 111.[1795] The Committee rejected this argument on the basis that Ethiopia had not been able to provide specific evidence of individual cases where the persons concerned had been engaged in activities detrimental to Ethiopia's national security.

> "The Committee points out that the substantive and procedural protections set forth in Articles 1 and 4 of Convention No. 111 apply to all workers regardless of their nationality or citizenship. The Committee notes that, in the absence of any indication that the individuals concerned were expelled on the basis of their own individual activities, this would amount to a presumption regarding their political opinion based on their nationality or national extraction, as the case might be, without a showing of activity prejudicial to the security of the State.

[1794] Paragraphs 1 to 3 of this provision state: "1. Where required by national legislation, each Contracting Party shall issue residence permits to migrant workers who have been authorised to take up paid employment on their territory under conditions laid down in this Convention. 2. The residence permit shall in accordance with the provisions of national legislation be issued and, if necessary, renewed for a period as a general rule at least as long as that of the work permit. When the work permit is valid indefinitely, the residence permit shall as a general rule be issued and, if necessary, renewed for a period of at least one year. It shall be issued and renewed free of charge or for a sum covering administrative costs only. 3. The provisions of this Article shall also apply to members of the migrant worker's family who are authorised to join him in accordance with Article 12 of this Convention."

[1795] This provision states: "Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice."

Moreover, deportations of tens of thousands of persons, conducted on such a large scale, cannot be regarded per se as measures taken within the meaning of Article 4. While the Government has stated that its decision to deport the individuals concerned was based on concrete evidence that these persons were engaged in activities detrimental to national security, the Committee was not provided with specific evidence of individual cases where individuals were shown to have engaged in activities prejudicial to the security of the State. The Committee is therefore bound to conclude that at least some of the deportations constituted discriminatory acts on the basis of political opinion within the meaning of Article 1(1)(a)[1796] of the Convention."[1797]

794. The relevant international instruments also contain specific limitations on the grounds for the expulsion of migrant workers, which relate directly to the particular situation of this category of aliens. These limitations concern grounds relating to the migrant worker's incapacity to work, unemployment, lack of means, failure to fulfil an obligation arising out of a work contract, or deprivation of rights relating to residence or work permit.

795. The Convention (No. 97) concerning Migration for Employment (Revised 1949) prohibits the expulsion of a migrant worker who intends to settle permanently in the host country,[1798] as well as members of his or her family, for reasons related to the migrant worker's incapacity to work due to illness contracted or injury sustained subsequent to his or her entry into the country. However, States parties to the Convention may delay the beginning of this protection for up to five years from the date of the admission of the migrant worker. Article 8 provides as follows:

> "1. A migrant for employment who has been admitted on a permanent basis and the members of his family who have been authorised to accompany or join him shall not be returned to their territory of origin or the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry, unless the person concerned so desires or an international agreement to which the Member is a party so provides.
>
> "2. When migrants for employment are admitted on a permanent basis upon arrival in the country of immigration the competent authority of that country may determine that the provisions of paragraph 1 of this Article shall take effect only after a reasonable period which shall in no case exceed five years from the date of admission of such migrants."

[1796] That provision states: "1. For the purpose of this Convention the term *discrimination* includes: (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; […]".

[1797] International Labour Organization, note 1155 above, para. 36 (citations omitted).

[1798] See, in this respect, International Labour Organization, General Survey on Migrant Workers, 1999, para. 108: "Certain provisions, however, relate only to migrants and members of their families who intend to settle permanently in the host country, in particular Article 8 of Convention No. 97 which is aimed at protecting migrant workers and their families from expulsion from the host country on the grounds of incapacity to work. […]"

796. The Convention (No. 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers provides that a State Party may not consider a migrant worker as illegally or irregularly present in its territory because of the mere fact of the loss of his or her employment. Therefore, such an occurrence may not justify the withdrawal of his or her authorisation of residence or work permit, which would oblige the individual to leave the territory of the State. Article 8 provides as follows:

> "1. On condition that he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit.
>
> "2. Accordingly, he shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining."

797. The European Convention on the Legal Status of Migrant Workers provides that migrant workers should not be expelled for reasons of unemployment at least for a period of time. Article 9, paragraph 4, provides as follows:

> "If a migrant worker is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident or because he is involuntarily unemployed, this being duly confirmed by the competent authorities, he shall be allowed for the purpose of the application of Article 25 of this Convention to remain on the territory of the receiving State for a period which should not be less than five months. Nevertheless, no Contracting Party shall be bound, in the case provided for in the above sub-paragraph, to allow a migrant worker to remain for a period exceeding the period of payment of the unemployment allowance."

798. Moreover, the Migrant Workers Recommendation R151, adopted by the General Conference of the International Labour Organization on 24 June 1975, provides that a migrant worker who has lost his employment should be given sufficient time to find alternative employment:

> "[a] migrant who has lost his employment should be allowed sufficient time to find alternative employment, at least for a period corresponding to that during which he may be entitled to unemployment benefits; the authorisation of residence should be extended accordingly."[1799]

799. The Migration for Employment Recommendation 86 (Revised), adopted by the General Conference of the International Labour Organization on 1 July 1949, provides that Member States should not remove a migrant worker or his or her family members from their territories for reasons

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[1799] International Labour Organization, Migrant Workers Recommendation, R151, adopted by the General Conference of the International Labour Organization on 24 June 1975, para. 31.

related to his or her lack of means or the state of the employment market, unless an agreement has been concluded to this effect between the competent authorities of the emigration and immigration territories concerned. Part VI, paragraph 18, provides as follows:

> "(1) When a migrant for employment has been regularly admitted to the territory of a Member, the said Member should, as far as possible, refrain from removing such person or the members of his family from its territory on account of his lack of means or the state of the employment market, unless an agreement to this effect has been concluded between the competent authorities of the emigration and immigration territories concerned.
>
> "(2) Any such agreement should provide:
>
> "(a) that the length of time the said migrant has been in the territory of immigration shall be taken into account and that in principle no migrant shall be removed who has been there for more than five years;
>
> "(b) that the migrant must have exhausted his rights to unemployment insurance benefit;
>
> "(c) that the migrant must have been given reasonable notice so as to give him time, more particularly to dispose of his property;
>
> "(d) that suitable arrangements shall have been made for his transport and that of the members of his family;
>
> "(e) that the necessary arrangements shall have been made to ensure that he and the members of his family are treated in a humane manner; and
>
> "(f) that the costs of the return of the migrant and the members of his family and of the transport of their household belongings to their final destination shall not fall on him."[1800]

800. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also prohibits the expulsion of a migrant worker for reasons related to his or her failure to fulfil an obligation arising out of a work contract, "unless the fulfilment of that obligation constitutes a condition for such authorization or permit". Article 20, paragraph 2, provides as follows:

> "2. No migrant worker or member of his or her family shall be deprived of his or her authorization of residence or work permit or expelled merely on the ground of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition for such authorization or permit."

[1800] International Labour Organization, Migration for Employment Recommendation (Revised), R86, adopted by the General Conference of the International Labour Organization on 1 July 1949, VI – para. 18.

801. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families further prohibits the expulsion of migrant workers who are documented or in a regular situation in order to deprive them or their family of the rights arising out of their authorization of residence or work permit. Article 56, paragraph 2, provides as follows:

> "2. Expulsion shall not be resorted to for the purpose of depriving a migrant worker or a member of his or her family of the rights arising out of the authorization of residence and the work permit."

802. Paragraph 3 of the same article provides that in expelling such an individual, a State must take into account humanitarian considerations and the duration of the migrant worker's residence in its territory.

> "3. In considering whether to expel a migrant worker or a member of his or her family, account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment."

803. Some national laws specifically deal with the grounds which may justify the expulsion of a migrant worker. The relevant national legislation may provide for the cancellation of the permit of a migrant worker who presents a threat to the State's *ordre public*, morality or health.[1801]

(b) Human rights considerations

(i) Rights of the family

804. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides special protection for the family members of a migrant worker in the event of the death of the migrant worker who is documented or in a regular situation, or dissolution of marriage. In these cases, States Parties are called to favourably consider granting family members an authorization to stay. Article 50, paragraphs 1 and 3, provides as follows:

> "1. In the case of death of a migrant worker or dissolution of marriage, the State of employment shall favourably consider granting family members of that migrant worker residing in that State on the basis of family reunion an authorization to stay; the State of employment shall take into account the length of time they have already resided in that State.
>
> […]
>
> "3. The provisions of paragraphs 1 and 2 of the present article may not be interpreted as adversely affecting any right to stay and work otherwise granted to such family members by the legislation of the State of employment or by bilateral and multilateral treaties applicable to that State."

[1801] Panama, 1960 Decree-Law, article 18.

(ii) Property rights

805. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides specific protection of the rights and entitlements acquired by a migrant worker in the event of expulsion. Article 22, paragraph 9 provides as follows:

> "Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her."

806. The 1999 General Survey on Migrant Workers prepared by the International Labour Organization also recognized the right of migrant workers who are subject to expulsion to claim unpaid wages or similar entitlements.

> "Migrants who are the objects of an expulsion order … should further have the right to claim unpaid wages, salaries, fees or other entitlements due to them."[1802]

(c) Destination

807. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families confers upon a migrant worker who has been expelled the right to seek entry into a State other than his or her State of origin. Article 22, paragraph 7, provides as follows:

> "Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin." [1803]

3. Procedural requirements

808. Treaty provisions and other international instruments set forth procedural guarantees in relation to the expulsion of migrant workers. The 1999 General Survey on Migrant Workers prepared by the International Labour Organization stressed the requirement that migrant workers enjoy due process of law in the event of their expulsion:

> "Migrants who are the objects of an expulsion order should enjoy due process of law in respect of the expulsion procedure."[1804]

[1802] International Labour Organization, General Survey on Migrant Workers, 1999, para. 560.

[1803] The right of migrant workers to enter and remain in their State of origin is guaranteed in article 8, para. 2, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, note 266 above. ("Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.")

[1804] International Labour Organization, General Survey on Migrant Workers, 1999, para. 560.

(a) Right to submit reasons against expulsion

809. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families requires that the migrant worker be granted the right to submit reasons against his or her expulsion. Article 22, paragraph 4, provides as follows:

> "Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise."

810. National laws may provide hearings specifically with respect to the expulsion of migrant workers[1805] or grant hearings to employer organizations or employee organizations in respect of questions concerning migrant worker permits that involve aspects of principle or are otherwise of major importance.[1806]

(b) Right to consular protection

811. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families enunciates the right of a migrant worker to have recourse, in the event of his or her expulsion, to the protection and assistance of his or her State of origin, or a State representing the interests of the latter, and to be informed of this right. Article 23 provides as follows:

> "Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right."

(c) Right to legal assistance and interpretation

812. The Migrant Workers Recommendation R151, adopted by the General Conference of the International Labour Organization on 24 June 1975, recognizes the right of migrant workers who are subject to expulsion to receive legal assistance and interpretation under the same conditions as national workers. Recommendation R151, paragraph 33, provides as follows:

> "A migrant worker who is the object of an expulsion order should have a right of appeal before an administrative or judicial instance, according to conditions laid down in national laws or regulations. This appeal should stay the execution of the expulsion order,

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[1805] United States, INA, sections 210(e)(3), 216A(b)(2).

[1806] Sweden, 1989 Act, section 11.7.

subject to the duly substantiated requirements of national security or public order. *The migrant worker should have the same right to legal assistance as national workers and have the possibility of being assisted by an interpreter*." [Emphasis added.]

(d) Notification of a reasoned decision

813. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families requires that a decision on expulsion be duly notified to the migrant worker and the members of his or her family. The notification shall state the reasons for the expulsion except in cases where considerations related to national security require otherwise. Article 22, paragraph 3, provides as follows:

> "The decision shall be communicated to [migrant workers and members of their families] in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered."

(e) Right to a review procedure

814. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families recognizes the right of a migrant worker who is subject to expulsion to have the case reviewed by the competent authority, unless "compelling reasons of national security require otherwise". Moreover, the migrant worker has the right to request a stay of the expulsion decision pending its review. Article 22, paragraph 4, provides as follows:

> "Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review. the person concerned shall have the right to seek a stay of the decision of expulsion."

815. The European Convention on the Legal Status of Migrant Workers recognizes the right of a migrant worker whose residence permit is withdrawn to an effective appeal to a judicial or administrative authority in accordance with the procedure provided for in national legislation. Article 9, paragraph 5, provides as follows:

> "[…] Each Contracting Party nevertheless undertakes to grant to migrant workers whose residence permits have been withdrawn, an effective right to appeal, in accordance with the procedure for which provision is made in its legislation, to a judicial or administrative authority."

816. The Migrant Workers Recommendation R151, adopted by the General Conference of the International Labour Organization on 24 June 1975, recognizes that a migrant worker who is subject to expulsion should have a right of appeal before an administrative or judicial authority in accordance

with national law as well as the right to have the expulsion order suspended pending the appeal unless national security or public order require otherwise. Recommendation R151, paragraph 33, provides as follows:

> "A migrant worker who is the object of an expulsion order should have a right of appeal before an administrative or judicial instance, according to conditions laid down in national laws or regulations. This appeal should stay the execution of the expulsion order, subject to the duly substantiated requirements of national security or public order. […]"

817. The 1999 General Survey on Migrant Workers prepared by the International Labour Organization also stresses the right to legal redress in case of expulsion, as provided for in the Migrant Workers Recommendation R151 cited above, and expresses concern over the practice of certain States which do not allow the individual to remain in the country during the period of his or her appeal.

> "C. Redress in case of issuance of an expulsion order
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> "Migrant workers should be guaranteed, by virtue of a number of provisions in Recommendation No. 151, the right to legal redress should they lodge an appeal either claiming violation of benefits and compensation as specified in Paragraph 34(2), or against the issuance of an expulsion order, as specified in Paragraph 33. Paragraph 33 further specifies that migrants contesting an expulsion order should be permitted to reside in the country for the duration of the case – 'subject to the duly substantiated requirements of national security or public order' –, should have equal access with national workers to legal assistance, and should have access to an interpreter. […]"[1807]
>
> "The Committee notes with concern reports, including that of Germany, which indicate that an objection or action against the refusal of the granting or renewal of a residence permit does not postpone its effect, effectively implying that migrants may be removed from the country on the basis of an expulsion order which may turn out to be unjustified. The unintended effect of such policies may be to dissuade migrants who may otherwise believe their employment to have been unjustly terminated, from lodging an appeal. The Committee takes account of an opinion submitted by a non-governmental organization which pointed out that, even where a residence permit is prolonged to allow a migrant to pursue a complaint, in some cases this process may take several months or even years, and unless the migrant is also permitted to work during this time, in practice, many migrants may not have the means to complete the procedure or to cover his or her living expenses. At the same time as encouraging States to consider the possibility of permitting migrants to work during the period of their appeal, the Committee notes with interest that in certain countries, such as Senegal, legislation contains provisions to the effect that migrant workers have the choice between pursuing a complaint either in the country where the employment took place, or in their country of origin."[1808]

[1807] International Labour Organization, General Survey on Migrant Workers, 1999, para. 614.

[1808] Ibid., para. 616 (citations omitted).

818. National laws may provide for judicial review specifically with respect to the expulsion of migrant workers.[1809]

(f) Right to seek compensation and right to re-enter

819. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families deals with the possible annulment of a decision on expulsion and provides that in such a case the individual concerned is entitled to seek compensation. In addition, the migrant worker may not be prevented from re-entering the State on the basis of the annulled decision. Article 22, paragraph 5, provides as follows:

> "If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned."

4. Departure

(a) Reasonable opportunity to protect property or similar interests

820. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families requires that a migrant worker who is subject to expulsion be given a reasonable opportunity to settle any claims for wages and other entitlements. Article 22, paragraph 6 provides as follows:

> "In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities."

821. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also provides special protection for the family members of a migrant worker in the event of the death of the migrant worker or dissolution of marriage. In these cases, States Parties are called to favourably consider granting family members an authorization to stay. Should such an authorization be denied, the State Party shall grant the individuals concerned a reasonable period of time to prepare their departure. Article 50, which applies to migrant workers and family members who are documented or in a regular situation, provides as follows:

> "2. Members of the family to whom such authorization [to stay] is not granted shall be allowed before departure a reasonable period of time in order to enable them to settle their affairs in the State of employment.

[1809] See, for example, United States, INA, sections 210(e)(3), 216A(b)(2).

> "3. The provisions of paragraphs 1 and 2 of the present article may not be interpreted as adversely affecting any right to stay and work otherwise granted to such family members by the legislation of the State of employment or by bilateral and multilateral treaties applicable to that State."

(b) The cost of the expulsion

822. Article 9, paragraph 3, of the Convention (No. 143) Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers states that "[i]n case of expulsion of the worker or his family, the cost shall not be borne by them".

823. Article 9 of Annex II to Convention (No. 97) Concerning Migration for Employment (Revised 1949) enunciates the same principle with respect to a migrant worker who, for reasons not attributable to him or her, fails to secure the employment for which he or she had been recruited or other suitable employment:

> "[I]f a migrant for employment introduced into the territory of a Member in accordance with the provisions of Article 3 of this Annex fails, for a reason for which he is not responsible, to secure the employment for which he has been recruited or other suitable employment, the cost of his return and that of the members of his family who have been authorized to accompany or join him, including administrative fees, transport and maintenance charges to the final destination, and charges for the transport of household belongings, shall not fall upon the migrant."

824. Based on these treaty provisions, the question of the cost of expulsion was addressed in the 1999 General Survey on Migrant Workers prepared by the International Labour Organization. Concerning migrant workers who are in an irregular situation, this survey draws a distinction between situations in which such irregularity is not attributable to the migrant worker and situations in which it is. In the first case, the protection granted to him or her concerns the cost of his or her return (as well as family members), including transport costs, whereas in the second case the protection only concerns the cost of the expulsion itself. However, the survey shows that State practice is not uniform in this regard:

> "Article 9(3) of Convention No. 143 provides that 'in case of expulsion of the worker or his family, the cost shall not be borne by them'. A clear distinction should be made between (a) the case where the migrant worker is in an irregular situation for reasons which cannot be attributed to him or her (such as redundancy before the expected end of contract, where the employer failed to fulfil the necessary formalities to engage a foreign worker, etc.), in which case the cost of his or her return as well as the return of family members, including transport costs, should not fall upon the migrant, and (b) the case where the migrant worker is in an irregular situation for reasons which can be attributed to him or her, in which case, only the costs of expulsion may not fall upon the migrant. Few governments, such as the United Kingdom (Jersey), indicated that in all cases of expulsion the costs are covered by the State. Some, such as the Czech Republic and Greece, indicated that the cost of expulsion primarily fall on the irregular migrant, and only if he or she is incapable of covering the cost does the

> State assume the responsibility, or turns to the transport company or the employer of the worker concerned."[1810]
>
> "Other governments appear to have taken this provision as covering all the costs incurred in the expulsion of a migrant worker in an irregular situation and his or her family to the country of origin. Lebanon, for example, requested the Committee to specify which costs should not be borne by the worker in the event of expulsion. In fact, the Convention does not appear to refer to the return travel costs, but only to the costs of expulsion, i.e. the costs incurred by a State in ensuring that the clandestine worker leaves the country, for example, the costs of the administrative or judicial procedures involved in issuing an expulsion order or in implementing the order (i.e. the costs incurred by a member State in connection with expulsion, such as escorting the worker and his or her family out of the country). Where the legislation provides that these costs are recoverable from the migrant worker, the Convention is not fully applied. On this point, the Committee refers to its numerous observations on this subject, and in particular its direct requests of 1993 and 1995 addressed to Norway, in which it considered that 'the costs of surveillance referred to in section 46 of the Immigration Act constitute administrative costs within the context of escorting the migrant worker to the frontier that must be borne by the State which wishes to ensure that the worker and his family actually leave the country following the decision to expel'. However, those countries which leave it to the expelled migrant worker to pay his or her own travel costs are not for that reason failing to apply this provision of the Convention. This approach is borne out by the consideration that, if the cost of expulsion included travel costs, the illegal migrant would find himself or herself in a better position than the regularly admitted migrant worker, which might even encourage migrant workers to remain in the country after the expiration of their residence permit in order to be expelled and hence repatriated free of charge."[1811]
>
> "Article 9 of Annex II to Convention No. 97 states that 'if a migrant for employment introduced into the territory of a Member in accordance with the provisions of Article 3 of this Annex fails, for a reason for which he is not responsible, to secure the employment for which he has been recruited or other suitable employment, the cost of his return and that of the members of his family who have been authorized to accompany or join him, including administrative fees, transport and maintenance charges to the final destination, and charges for the transport of household belongings, shall not fall upon the migrant'. The guarantee that the migrant will not, in cases of irregularity, pay for his or her expulsion appear also in Article 9 (3) of Convention No. 143 and in Paragraph 8 (5) of Recommendation No. 151 and have been discussed in paragraphs 310-311 above."[1812]

825. Article 22, paragraph 8 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families distinguishes between the cost of the expulsion

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[1810] International Labour Organization, General Survey on Migrant Workers, 1999, para. 310 (citations omitted).

[1811] Ibid., para. 311 (citations omitted).

[1812] Ibid., para. 612.

itself, which shall not be borne by the migrant worker, and the travel costs, which the migrant work may be required to pay:

> "In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs."

D. Minor children

1. Grounds and other considerations relating to the expulsion decision

826. The expulsion of aliens who are minor children, particularly those who are not accompanied by family members, has raised serious concerns in the international community. The expulsion of such aliens may be prohibited, or permitted only on very limited grounds.

827. The Special Rapporteur on the human rights of migrants, Gabriela Rodríguez Pizarro, expressed her "concern about cases of detention and expulsion of unaccompanied minors and the obstacles to family reunification encountered by such children".[1813]

828. In connection with the expulsion of long-term residents, the Parliamentary Assembly of the Council of Europe expressed the view that

> "[U]nder no circumstances should expulsion be applied to […] under-age children."[1814]

829. The Parliamentary Assembly recommended that the Committee of Ministers of the Council of Europe invite the governments of member States:

> "h) to guarantee that migrants who were born or raised in the host country and their under-age children cannot be expelled under any circumstances".[1815]

830. Within the European Union, attention may be drawn to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, dealing with the expulsion of citizens of the European Union. Preambular paragraph 24 of the Directive indicates:

> "[T]he greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only

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[1813] Commission on Human Rights, Report on the human rights of migrants, submitted by Gabriela Rodriguez Pizarro, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 2002/62, which was adopted by the Economic and Social Council in decision 2002/266, A/57/292, 9 August 2002, para. 65.

[1814] Council of Europe, Parliamentary Assembly, Recommendation 1504 (2001): Non-expulsion of long-term immigrants, 14 March 2001, para. 7.

[1815] Ibid., para. 11, (ii).

in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. *In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.*" [Emphasis added.]

831. More precisely, the Directive allows the expulsion of a minor child only if such a decision is based on "imperative grounds of public security" or is "necessary for the best interests of the child". Article 28, paragraph 3 (b), provides as follows:

> "3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
>
> […]
>
> "(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

2. Procedural requirements

832. The Committee on the Rights of the Child expressed its concern about "[i]ll-treatment of children by police during forced expulsion to the country of origin where, in some cases, they were deported without access to legal assistance and interpretation"[1816] and recommended that all measures be taken "to prevent irregular procedures in the expulsion of unaccompanied children".[1817]

833. National law may establish a special court to decide on the expulsion of minors.[1818]

E. Refugees

1. Grounds and other considerations relating to the expulsion decision

(a) Grounds

834. The expulsion of aliens who are refugees and are lawfully present in the territory of a State may be permitted only in exceptional circumstances and on limited grounds.

[1816] See, for example, Committee on the Rights of the Child, Concluding observations of the Committee on the Rights of the Child: Spain, 7 June 2002, CRC/C/15/Add.185 (13 June 2002), para. 45(a).

[1817] See, for example, Committee on the Rights of the Child, Concluding observations of the Committee on the Rights of the Child: Spain, 7 June 2002, CRC/C/15/Add.185 (13 June 2002), para. 46(d).

[1818] Italy, 1998 Decree-Law No. 286, article 31(4), 1998 Law No. 40, article 29(4), 1996 Decree Law, article 7(2).

835. The Executive Committee of the Programme of the United Nations High Commissioner for Refugees has recognized that the expulsion of refugees should only be permitted in exceptional circumstances. In its Conclusion No. 7 (XXVIII), the UNHCR Executive Committee:

> "(a) Recognized that, according to the 1951 Convention, refugees lawfully in the territory of a Contracting State are generally protected against expulsion and that in accordance with Article 32 of the Convention expulsion of a refugee is only permitted in exceptional circumstances ..."[1819]

836. The Convention relating to the Status of Refugees provides special protection to refugees lawfully present[1820] in the territory of a State by restricting the possible grounds for their expulsion to those related to national security or public order. Article 32, paragraph 1, provides as follows:

> "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."[1821]

[1819] United Nations High Commissioner for Refugees, Executive Committee Conclusion No. 7 (XXVIII) – 1977: Expulsion, 12 October 1977.

[1820] "Paragraph 1 [of article 32] deals with the expulsion of refugees lawfully in the country, which means that no such safeguards exist in favour of refugees unlawfully in the territory of the state, except those set up in Art. 31(2) and Art. 33. In other words, while, as a rule, refugees lawfully in a country may not be expelled except on the grounds and in the manner prescribed in Art. 32, illegal refugees may be expelled without such grounds, and without the guarantee of para. 2, except insofar as Art. 33 (1) [*see* Part X.E.2(b)] applies and insofar as Art. 31 requires the states to grant illegals sufficient time and facilities to obtain admission into another country: once the facilities have been granted and the reason able period has expired, expulsion (except to a dangerous area) may be ordered on the basis of an administrative decision and the procedure established for such cases at the discretion of every Contracting State. The prohibition of the expulsion of refugees lawfully in the country means in substance that, once a refugee has been admitted or legalized, he is entitled to stay there indefinitely and can forfeit this right only by becoming a national security risk or by disturbing public order and having these grounds established in accordance with the procedure prescribed in para. 2. It cannot be considered expulsion if a refugee who was admitted to a Contracting State on a temporary basis with a travel document issued by another Contracting State, is refused permission to stay there beyond the authorized period. Technically he would be a refugee 'unlawfully' in the country, although he would not fall into the category of illegal refugees of whom Art. 31 treats." Nehemiah Robinson, *Convention Relating to the Status of Refugees. Its History, Contents and Interpretation*, Institute of Jewish Affairs, World Jewish Congress, 1953 (reprinted in 1997 by the Division of International Protection of the United Nations High Commissioner for Refugees), pp. 133-134. See *Chim Ming v. Marks, District Director, Immigration and Naturalization Service and Rogers, Secretary of State, Lim Yim Yim v. Marks, District Director, Immigration and Naturalization Service,* United States Court of Appeals, Second Circuit, 8 November 1974, *International Law Reports*, volume 70, E. Lauterpacht, C.J. Greenwood (eds.), pp. 360-362 (Article 32 of the Refugee Convention does not protect individuals not lawfully admitted to the territorial State from deportation).

[1821] Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, *Treaty Series,* vol. 189, No. 2545, p. 150, article 32, para. 1. The view has been expressed that this provision precludes the expulsion of refugees for purely political or economic reasons. *See* the commentary by Dr. E Jahn, reproduced in: International Law Association, Committee on the Legal Aspects of the Problem of Asylum, Report and draft

837. According to the *Commentary on the Refugee Convention* prepared by Grahl-Madsen and subsequently published by UNHCR, expulsion carried out in accordance with this provision is the only lawful means for compelling a refugee lawfully present in the territory of a State to leave the territory:

> "With regard to refugees lawfully staying in the territory of the Contracting State concerned, it follows from Article 32 that expulsion is the only lawful measure of removal, and the simple expedient of 'refoulement' may therefore not be applied to such refugees."[1822]

838. The notion of "national security" as a valid ground for the expulsion of refugees is not explicitly addressed in the Convention. According to Grahl-Madsen's *Commentary*, this notion may be understood to include the following:

> "[a]nything that threatens a country's sovereignty, independence, territorial integrity, constitution, government, external peace, war potential, armed forces or military installations."[1823]
>
> "In short, the concept of 'national security' may be invoked in the case of acts of a rather serious nature threatening directly or indirectly the government, the integrity, the independence or the external peace of the country."[1824]

839. Moreover, a refugee may constitute a threat to national security even if he or she is not guilty of any crime. According to Grahl-Madsen's *Commentary*, a refugee who persists in producing or disseminating propaganda against a foreign government may be subject to expulsion on national security grounds even if such conduct does not constitute a crime.[1825]

840. The notion of "public order" as a valid ground for the expulsion of refugees was addressed during the preparation and negotiation of the Convention. The legislative history of the Convention indicates that public order as a ground for the expulsion of refugees may apply if a refugee has been convicted of certain serious crimes. Although the specification of the public order ground for the expulsion of refugees is left to the jurisdiction of the State Parties, it seems that the notion of "public

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conventions on diplomatic and territorial asylum, *Conference Report 1970*, pp. 45-61, at p. 61: "[...] While the 1951 Convention does not impose an obligation on States to grant refugees permanent residence, it nevertheless limits the circumstances in which it is possible to deport a refugee whose situation has been regularized. Thus Article 32 of the Convention provides that a refugee lawfully staying in the territory may only be expelled on grounds of 'national security and public order', i.e., not for purely political or economic reasons".

[1822] Atle Grahl-Madsen, note 990 above, *ad article 33*, para. 2.

[1823] Ibid., *ad article 32*, para. 5.

[1824] Ibid.

[1825] Ibid.

order" may not justify expulsions based on "social grounds", such as illness and disability, nor expulsions on the basis of indigence, which would be contrary to article 23[1826] of the Convention.

841. The notion of public order as a valid ground for the expulsion of refugees based on the legislative history of the Convention has been discussed by Nehemiah Robinson as follows:

> "The meaning of 'national security or public order' is the same as elsewhere in the Convention (e.g., Art. 28). The same words were used in the earlier agreements. There was some dissatisfaction in the Ad Hoc Committee and the Conference with the vagueness of the expression 'public order' and the different interpretations given to the term in different countries, because of the existing divergencies in the social systems or legal prohibitions. The Committee felt that it was necessary to take into account the meaning which this term had acquired in certain systems of law. The Committee was of the opinion that the deportation of aliens who had been convicted of certain serious crimes would be permissible under this article, if such crimes are considered in that country as violations of 'public order'. The Conference felt that specification of grounds for deportation must be left to the jurisdiction of the state concerned. On the other hand, 'public order' would not, in the view of the. Ad Hoc Committee, permit the deportation of aliens on 'social grounds', such as indigence or illness or disability. Deportation on basis of indigence would conflict with Art. 23 of the Convention."[1827]

842. Concerning the criminal offences which may justify the expulsion of a refugee based on grounds of public order, Grahl-Madsen's *Commentary* suggests that a single minor offence would not be sufficient.

> "There are in fact certain misdemeanours which are of such a character that they may be said to upset the normal life of the citizens at large, and may cause considerable trouble for the police authorities, particularly if they are committed repeatedly or even habitually, as for example vagrancy, loitering and illegal manufacture and distribution of alcoholic beverages, also prostitution, if committed in such a way as to cause public 'scandal' or if it is likely to endanger public health.
>
> "One seems, however, to be on safe ground, if one submits that a single misdemeanour shall not lead to expulsion by virtue of Article 32, and that only such habitually or repeatedly committed misdemeanours which amount to a real public nuisance may at all be considered as a possible justification for such a serious step."[1828]

[1826] This article provides: "The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals."

[1827] Nehemiah Robinson, *Convention Relating to the Status of Refugees. Its History, Contents and Interpretation*, Institute of Jewish Affairs, World Jewish Congress, 1953 (reprinted in 1997 by the Division of International Protection of the United Nations High Commissioner for Refugees), p. 134.

[1828] Atle Grahl-Madsen, note 990 above, *ad article 32*, para. 6.

843. According to Grahl-Madsen's *Commentary*, the commission of a crime by a refugee, however serious it may be, may justify his or her expulsion only if "[…] the continued presence of the offender is prejudicial to the maintenance of public order, that is to say the preservation of peace and tranquility in the society at large".[1829]

844. Nevertheless, a refugee may constitute a threat to public order even if he or she is not guilty of any crime. According to Grahl-Madsen's *Commentary*, a refugee who instigates riots or creates unrest among the population may be subject to expulsion on public order grounds even if such conduct does not constitute a crime.[1830]

845. The UNHCR Sub-Committee of the Whole on International Protection has provided a restrictive interpretation of the concepts of "national security" and "public order" and emphasized that expulsion should only be resorted to when it is the only means for protecting the legitimate interest of the State:

> "The concept of "national security or public order" may be difficult to apply in a particular case. The *travaux préparatoires* to the provision argue in favour of a restrictive interpretation in the sense that a refugee should only be expelled as a last resort and as the only practicable means of protecting the legitimate interests of the State."[1831]

846. Some national laws specify the grounds for the expulsion of a refugee. A State may expel a recognized refugee if the latter (1) is considered undesirable[1832] or (2) has engaged in certain criminal activities or other violations of the law, presents a threat to the State's *ordre public* or national security, or has committed an international crime.[1833]

847. A State may also cancel a refugee's permit of stay if the refugee gains the protection of the alien's State or a third State, or refuses the protection of one of these States once the reasons for the alien's protected status as a refugee have ceased to exist.[1834]

[1829] Ibid.

[1830] Ibid.

[1831] Office of the United Nations High Commissioner for Refugees, Note on expulsion of refugees, Sub-Committee of the Whole on International Protection, 24 August 1977, EC/SCP/3, para. 4.

[1832] Czech Republic, 1999 Act, section 10(c).

[1833] Canada, 2001 Act, articles 112(3), 115(2); Czech Republic, 1999 Act, section 10(a)-(b); Germany, 2004 Act, article 56(1)(5); Guatemala, 1986 Decree Law, article 25; Japan, 1951 Order, articles 61-2-2(3)-(4), 61-2-4(1)(4)-(7), 61-2-5, 61-2-7(1), 61-2-8, 61-2-12(1), (8)-(9), 61-2-13; Republic of Korea, 1992 Act, article 76-6; Sweden, 1989 Act, sections 3.4, 4.10; and United States, INA, section 207(c)(4). A State may expressly excuse certain violations committed by refugees (Republic of Korea, 1992 Act, article 2(13)).

[1834] Sweden, 1989 Act, section 3.5.

848. In the *Homeless Alien (Germany) Case* of 30 September 1958, the German Federal Administrative Supreme Court considered the grounds for the expulsion of refugees with respect to national security or public order under article 32 of the Convention and the relevant national law. The Court stated as follows:

> "A foreign national who has been found guilty of a criminal offence is, as a general rule, expelled to his home State. This procedure, however, is not feasible in the case of a homeless alien or foreign refugee because, for the reasons set out in the Convention, he is in danger of his life and liberty in his home State, and it would be contrary to the rules applying in a community that upholds right and justice to hand over a person in such danger to the whims of a State of that kind. Third States would hardly be prepared to receive a foreign national who has been convicted of criminal offences even though he may be a foreign refugee. It is for these reasons that the rights of receiving countries to expel foreign nationals were intended to be restricted. It is only when overwhelming interests of State, *viz.*, grounds of national security or public order, are present – and that is the true sense of Section 23 of the Law and Article 32 of the Convention – that a State has the right to order the expulsion of such a foreign national."[1835]

(b) Human rights considerations

849. The importance of considering the serious consequences of the expulsion of a refugee on the individual concerned as well as his or her close or immediate family members has been emphasized by UNHCR.

850. The UNHCR Sub-Committee of the Whole on International Protection has indicated that considerations related to family life should be taken into account in the expulsion of a refugee:

> "Consideration should also be given to the consequences of an expulsion measure for the close family …"[1836]

851. The Executive Committee of the High Commissioner's Programme has recognized that the expulsion of a refugee may have serious consequences for the individual concerned as well as his or her immediate family members. In its Conclusion No. 7 (XXVIII), the Executive Committee:

> "(b) Recognized that a measure of expulsion may have very serious consequences for a refugee and his immediate family members residing with him …"[1837]

[1835] *Homeless Alien (Germany) Case,* note 702 above.

[1836] Office of the United Nations High Commissioner for Refugees, note 1831 above, para. 9.

[1837] Conclusion No. 7, note 1819 above.

2. Destination

(a) Consideration of admissibility to a State other than the State of origin

852. The UNHCR Sub-Committee of the Whole on International Protection has indicated that the expulsion of a refugee should take into consideration the admissibility of the refugee to a State other than the State of origin.

> "Consideration should also be given … to the question whether the refugee is able to proceed to another country other than his country of origin."[1838]

853. The Executive Committee of the High Commissioner's Programme has also recommended that the expulsion of a refugee should include due consideration of the admissibility of the refugee to a State other than the State of origin. The Executive Committee has further recommended that delinquent refugees be treated the same as national delinquents in cases where the implementation of expulsion is impracticable. In its Conclusion No. 7 (XXVIII), the Executive Committee:

> "(c) Recommended that, in line with Article 32 of the 1951 Convention, expulsion measures against a refugee should only be taken in very exceptional cases and after due consideration of all the circumstances, including the possibility for the refugee to be admitted to a country other than his country of origin;
>
> "(d) Recommended that, in cases where the implementation of an expulsion measure is impracticable, States should consider giving refugee delinquents the same treatment as national delinquents and that States examine the possibility of elaborating an international instrument giving effect to this principle …"[1839]

(b) The principle of *non-refoulement*

(i) The content of the principle

854. Article 33 of the Convention relating to the Status of Refugees prohibits the expulsion of a refugee to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. According to paragraph 1 of this provision:

> "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

[1838] Office of the United Nations High Commissioner for Refugees, note 1831 above, para. 9.

[1839] Conclusion No. 7, note 1819 above.

855. This principle of *non-refoulment* "applies not only in respect of the country of origin but to any country where a person has reason to fear persecution".[1840] Although a State is not under an obligation to allow a refugee to take up residence in its territory, in the situations envisaged here the refugee "must be allowed to stay somewhere in some way or another".[1841]

856. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa contains a very similar prohibition. Article 2, paragraph 4 of this convention provides:

> "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2."[1842]

857. The principle of *non-refoulement* has been considered as not implying any geographical limitation since it would cover not only the transfer of an individual to a State where he or she would face a risk of persecution, but also to a third country which will then transfer the refugee to a State in which such a risk exists:

> "The removal of a refugee from one country to a third country which will subsequently send the refugee onward to the place of feared persecution constitutes indirect refoulement in contravention with the above-mentioned international human rights instruments."[1843]

858. In *Immigration and Naturalization Service v. Stevic*, the United States Supreme Court considered the standards for determining whether a refugee could be expelled from the United States under article 33 of the Convention as well as the relevant national law. The Court stated as follows:

[1840] Office of the United Nations High Commissioner for Refugees, Note on non-refoulement (submitted by the High Commissioner), Sub-Committee of the Whole on International Protection, 23 August 1977, EC/SCP/2, para. 4.

[1841] Atle Grahl-Madsen, note 990 above, *ad article 33*, para. 4.

[1842] Article 1, paras. 1 and 2, of the OAU Convention read as follows: "Definition of the term 'Refugee' – 1. For the purposes of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it. 2. The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

[1843] Commission on Human Rights, Subcommission on the Promotion and Protection of Human Rights, Resolution 2000/20, The right to seek and enjoy asylum, 18 August 2000, preambular para. 11.

> "The Court of Appeals' decision rests on the mistaken premise that every alien who qualifies as a 'refugee' under the statutory definition is also entitled to a withholding of deportation under § 243(h). We find no support for this conclusion in either the language of § 243(h), the structure of the amended Act, or the legislative history. ... We have deliberately avoided any attempt to state the governing standard beyond noting that it requires that an application be supported by evidence establishing that it is more likely than not that the alien would be subject to persecution on one of the specified grounds."[1844]

859. In *Immigration and Naturalization Service v. Cardozo-Fonseca*, the United States Supreme Court further considered the meaning of the term "refugee", the threshold for the principle of *non-refoulement*, and the discretionary authority to grant the broader relief of asylum to refugees. The Court stated as follows:

> "In Stevic, we dealt with the issue of withholding of deportation, or *non-refoulement*, under § 243(h). This provision corresponds to Article 33.1 of the Convention. Significantly though, Article 33.1 does not extend this right to everyone who meets the definition of 'refugee.' Rather, it provides that '[n]o Contracting State shall expel or return ('refouler') a *refugee* in any manner whatsoever to the frontiers or territories *where his life or freedom would be threatened* on account of his race, religion, nationality, membership or a particular social group or political opinion.' 19 UST, at 6276, 189 UNTS, at 176 (emphasis added). Thus, Article 33.1 requires that an applicant satisfy two burdens: first, that he or she be a 'refugee,' i.e., prove at least a 'well-founded fear of persecution'; second, that the 'refugee' show that his or her life or freedom 'would be threatened' if deported. Section 243(h)'s imposition of a 'would be threatened' requirement is entirely consistent with the United States' obligations under the Protocol.
>
> "Section 208(a), by contrast, is a discretionary mechanism which gives the Attorney General the *authority* to grant the broader relief of asylum to refugees. As such, it does not correspond to Article 33 of the Convention, but instead corresponds to Article 34. *See* Carvajal-Munoz, 743 F2d, at 574, n 15. That Article provides that the contracting States 'shall as far as possible facilitate the assimilation and naturalization of refugees…' Like § 208(a), the provision is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible. Also like § 208(a), an alien must only show that he or she is a 'refugee' to establish eligibility for relief. No further showing that he or she 'would be' persecuted is required.
>
> "Thus, as made binding on the United States through the Protocol, Article 33.1 provides for a precatory, or discretionary, benefit for the entire class of persons who qualify as 'refugees' whereas Article 34 provides an entitlement for the subcategory that 'would be threatened' with persecution upon their return. This precise distinction between the broad class

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[1844] *Immigration and Naturalization Service v. Stevic*, U.S. Supreme Court, 467 U.S. 407, 104 S.Ct. 2489, 81 L.Ed.2d 321 (5 June 1984).

of refugees and the sub-category entitled to § 243(h) relief is plainly revealed in the 1980 Act."[1845]

(ii) Refugees unlawfully present in the territory of a State

860. Contrary to article 32 of the Convention, which only protects refugees who are lawfully present in the territory of the State, article 33 also covers refugees who are unlawfully present.[1846] Furthermore, it has been held that article 33 also protects individuals who are not – or not yet – documented as refugees,[1847] provided that they have succeeded in entering the territory of the State. A State Party is not, however, prohibited from preventing the entry of a refugee into its territory under article 33.

861. Thus, article 33 provides protection to illegal refugees who are physically present in the territory of a State as well as prima facie refugees pending a decision on the determination of their status. This provision is discussed in Grahl-Madsen commentary as follows:

> "Article 33 applies to any Convention refugee who is physically present in the territory of a Contracting State, irrespective of whether his presence in that territory is lawful or unlawful, and regardless of whether he is entitled to benefit from the provision of Article 31 or not.

[1845] *Immigration and Naturalization Service, v. Cardoza-Fonseca,* United States Supreme Court, 9 March 1987, *International Law Reports*, volume 79, E. Lauterpacht, C.J. Greenwood (eds.), pp. 610-641.

[1846] "The principle of *non-refoulement* is the cornerstone of the protection of refugees, and is applicable whether or not refugees are lawfully admitted into the receiving State, and whether refugees arrive individually or *en masse*." International Law Association, Declaration of principles of international law on mass expulsion, 62nd conference of the ILA, Seoul, 24-30 August 1986, *Conference Report 1986*, pp. 13-18, at p. 16, Principle 12. See also Office of the United Nations High Commissioner for Refugees, note 1840 above, para. 4.

[1847] "16. There are, however, a number of situations in which the observance of the principle of non-refoulement is called for, but where its application may give rise to difficulties of a technical nature. Thus the person concerned may find himself in a State which is not a party to the 1951 Convention or the 1967 Protocol, or which, although a party to these instruments, has not established a formal procedure for determining refugee status. The authorities of the country of asylum may have allowed the refugee to reside there with a normal residence permit or may simply have tolerated his presence and not have found it necessary formally to document his recognition as a refugee. In other cases, the person concerned may have omitted to make a formal request to be considered a refugee. 17. In situations of this kind it is essential that the principle of non-refoulement be scrupulously observed even though the person concerned has not – or has not yet – been formally documented as a refugee. It should be borne in mind that the recognition of a person as a refugee, whether under the Statute of UNHCR or under the 1951 Convention or the 1967 Protocol, is declaratory in nature. Since the Committee's twenty-seventh session, there have been a number of cases of. persons not formally recognized as refugees being returned to their country of origin despite the fact that they had a justified fear of persecution, or where their claim to such fear of persecution was not even examined." Ibid., paras. 16 and 17.

> "Just like Article 31 (2), Article 33 must also be considered to apply to persons who are prima facie refugees, pending a decision whether they come within the definition in Article 1."[1848]

862. Robinson's commentary notes the important distinction between refugees who are physically present in the territory of a State, legally or illegally, and those who have not yet entered the State for purposes of article 33 as follows:

> "Article 33 concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refugees who seek entrance into this territory. In other words. Art. 33 lays down the principle that once a refugee has gained asylum (legally or illegally) from persecution, he cannot be deprived of it by ordering him to leave for, or by forcibly returning him to, the place where he was threatened with persecution, or by sending him to another place were the threat exists, but that no Contracting State is prevented from refusing entry in this territory to refugees at the frontier. In other words, if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck."[1849]

(c) Exceptions to the principle of *non-refoulement* under treaty law

863. The protection granted by article 33 of the Convention relating to the Status of Refugees is not absolute. In fact, it does not apply in two cases: (1) if the refugee represents a danger to the security of the country; or (2) if he or she has been convicted by a final judgment of a particularly serious crime and constitutes therefore a danger to the community of that country. Article 33, paragraph 2, provides as follows:

> "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

864. Although these exceptions "should be applied with the greatest caution",[1850] Robinson's commentary indicates that States enjoy a considerable degree of latitude in appreciating whether there are "reasonable grounds" for regarding a person as a danger to national security. In addition, the commentary discusses the complex relations between the second exception contained in article 33,

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[1848] Atle Grahl-Madsen, note 990 above, *ad article 33*, para. 2.

[1849] Nehemiah Robinson, note 1826 above, p. 131. See also Atle Grahl-Madsen, note 990 above, *ad article 33*, para. 3.

[1850] Office of the United Nations High Commissioner for Refugees, note 1840 above, para. 14.

paragraph 2, and article 1, Section F. (b) of the Convention according to which serious crimes committed outside the country deprive the criminal of the right to be considered as a refugee.[1851]

> "6. Paragraph 2 is an exception to the rule of paragraph 1 permitting expulsion or return of certain categories of refugees to the country of danger. 'Reasonable grounds' are sufficient in the case of 'security risks' because of the political nature of the risk and the impossibility of having it stated in more definite terms. 'Reasonable grounds' was explained by the mover of paragraph 2 (the British representative) as leaving it to the states to determine whether there were sufficient grounds for regarding any refugee as a danger to the security of the country and whether the danger entailed to refugees by expulsion outweighed the menace to public security that would arise if they were permitted to stay. As to the second group of 'dangerous persons', they comprise only cases of a final judicial decision in particularly serious crimes: in such cases, instead of punishment in the usual manner, expulsion may be ordered, if necessary, to the frontiers of the country where the life or freedom of the refugee may be threatened. The crime to which Art. 33 refers need not have been committed in the country of refuge. It should be remembered, however, that serious crimes committed outside that country deprive the criminal of the right to be considered as a refugee (Art. 1, Section F *(b))* and therefore deprive him automatically of the guarantees established in the Convention.
>
> "There is a difference between the wording of Art. 1 (F) *(b)* and Art. 33, relating to common criminals. The former requires only that there be serious reasons for considering that the person has committed a serious non-political crime, while the latter cannot be applied unless he has been found guilty of such a crime by a final decision of the court. Obviously, if a person cannot be considered a refugee he cannot enjoy the protection of Art. 33; it would therefore suffice to uncover sufficient evidence to consider that he has committed a serious crime outside the country of refuge, to deprive him of his status as a refugee. However, to expel him, such evidence would not be sufficient under Art. 33, but, on the other hand, he could not enjoy the benefits of Art. 33 and might theoretically be expelled anyhow. Art. 33 would serve as a definite protection in cases where the crime was committed by a refugee in the country of refuge or elsewhere, after his admission thereto, since Art. 1 (F) *(b)* does not refer to such crimes. To conform with its wording Art. 33 is to be interpreted in the sense that only convicted criminals (regardless of where the crime was committed) could be expelled, and that the deprivation of the status of a refugee would not by itself be a reason justifying expulsion.
>
> "7. It should be added that Art. 33, para. 2 must be read in connection with Articles 31 and 32. In other words, expulsion and return under para. 2 are conditioned upon the obligation of the state to grant the refugee a reasonable period of time and all necessary facilities to

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[1851] Article 1(F)(b) of the Convention states: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: […] (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee".

> obtain admission into another country. Only if the refugee fails to gain admission into another country, may expulsion or return to the country of peril take place."[1852]

865. The notion of national security for purposes of the article 33 of the Convention is discussed by Grahl-Madsen, as follows:

> "Generally speaking, the notion of "national security" or "the security of the country" is invoked against acts of a rather serious nature endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned."[1853]

866. Moreover, the notion of "danger" as referred to in article 33, paragraph 2, of the Convention relating to the Status of Refugees must be understood to mean "a present or future danger" as opposed to certain acts committed in the distant past.

> "It seems to be a fair interpretation that the word 'danger' must mean a 'present or future danger'. Apart from the fact that a conviction is not necessary for expulsion for reasons of national security, a conviction for espionage or some other activity which is traditionally considered as a threat to the national security, will not in itself warrant the application of Article 33 (2). This is particularly true if the act for which he is convicted has been committed in a distant past. Only if his continued presence is regarded as a danger to the security of the country, the authorities may expel him to a country of persecution. But if such a danger may be said to exist, it is immaterial for the application of the provision whether the State may safeguard its interests by other measures than expulsion […]
>
> "It is therefore not the acts the refugee has committed, which warrant his expulsion, but these acts may serve as an indication as to the behaviour one may expect from him in the future, and thus indirectly justify his expulsion to a country of persecution.
>
> "Because Article 33 (2) is concerned with the present and future more than with the past, it seems that the authorities in many cases ought to give a refugee fair warning and a chance to amend his ways, before expulsion to a country of persecution is seriously considered. It must be emphasized that Article 33 (2) clearly calls for deciding each individual case on its own merits."[1854]

[1852] Nehemiah Robinson, note 1827 above.

[1853] Atle Grahl-Madsen, note 990 above, *ad article 33*, para. 8.

[1854] Ibid., para. 7.

(d) The non-derogability of the principle of *non-refoulement* under treaty law or customary law

(i) The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

867. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa does not provide for any exception to the prohibition of *non-refoulement* contained in article 2, paragraph 3.

(ii) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

868. As discussed previously, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits the expulsion of an alien to any State where he or she may be subject to torture without exception.[1855] Article 3, paragraph 1, provides as follows:

> "No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

(iii) The application of the absolute principle of *non-refoulement* for torture to refugees

869. In several of its Conclusions, the Executive Committee of the Programme of the United Nations High Commissioner for Refugees has interpreted the principle of *non-refoulement* with respect to refugees as encompassing both the prohibition set forth in article 33 of the Refugee Convention and the prohibition contained in article 3, paragraph 1, of the Torture Convention.

> "[T]he principle of *non-refoulement* […] prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have been formally granted refugee status, or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture, as set forth in the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment."[1856]

[1855] *See* Part VII.C.3(b)(ii).

[1856] Executive Committee of the Programme of the United Nations High Commissioner for Refugees, Conclusion No. 79 (XLVII) – 1996: General conclusion on international protection, 11 October 1996, lit. (j). See also United Nations High Commissioner for Refugees, Executive Committee Conclusion No. 81 (XLVIII) – 1997: General conclusion on international protection, 17 October 1997, lit. (i), and Executive Committee Conclusion No. 82 (XLVIII) – 1997: Safeguarding asylum, 17 October 1997, lit. (i).

870. UNHCR has further expressed its views concerning the principle of *non-refoulement* with respect to refugees under international law in a case that was pending before the Supreme Court of Canada. In *Suresh v. Minister of Citizenship and Immigration*, UNHCR referred to the absolute prohibition of *refoulement* with respect to torture and the prohibition of *refoulement* subject to limited exceptions under the terms of the Refugee Convention.

> "(a) where there are substantial grounds to believe a refugee, if *refouled*, will be subjected to torture, international law prohibits the *refoulement* of the refugee; and (b) where there are not substantial grounds to believe a refugee, if *refouled*, will be subjected to torture, *refoulement* can only be justified under article 33 (2) of the Refugee Convention if there is a very serious threat to the security of the country of refuge that is proportional to the risk faced by the refugee upon *refoulement*."[1857]

(iv) Recognition of the non-derogability of the principle of *non-refoulement* with respect to refugees within the United Nations

871. In 1996, the Commission on Human Rights expressed concern with respect to the widespread violation of the principle of *non-refoulement* in relation to refugees and recalled that this principle is not subject to derogation. In its resolution 1996/33 concerning torture and other cruel, inhuman or degrading treatment or punishment, the Commission stated as follows:

> "Distressed at the widespread violation of the principle of non-refoulement and of the rights of refugees, in some cases resulting in loss of refugee lives, and at reports indicating that large numbers of refugees and asylum-seekers have been refouled and expelled in highly dangerous situations, and recalling that the principle of non-refoulement is not subject to derogation".[1858]

872. In 1997, the General Assembly adopted resolution 52/132 in which it expressed similar concern with respect to the widespread violation of the principle of *non-refoulement* in relation to refugees and also recalled that this principle is not subject to derogation in the preamble. The General Assembly further called upon States to ensure effective protection of refugees by respecting the principle of *non-refoulement* in operative paragraph 16. It is significant to note that this language was contained in a resolution relating to human rights and mass exoduses in contrast to the resolution adopted by the Human Rights Commission in relation to torture. General Assembly resolution 52/132, which was adopted without a vote, states as follows:

> "*Distressed* by the widespread violation of the principle of non-refoulement and of the rights of refugees, in some cases resulting in loss of refugee lives, and at reports indicating that

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[1857] United Nations High Commissioner for Refugees, Factum of the Intervenor, UNHCR, *Suresh v. Minister of Citizenship and Immigration*, Supreme Court of Canada No. 27790, submitted 8 March 2001, para. 4.

[1858] Commission on Human Rights, resolution 1996/33, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 19 April 1996, preambular para. 14.

> large numbers of refugees and asylum-seekers have been refouled and expelled in highly dangerous situations, and recalling that the principle of non-refoulement is not subject to derogation, […]
>
> "16. *Calls upon* States to ensure effective protection of refugees through, *inter alia*, respecting the principle of non-refoulement."[1859]

(e) The nature of the principle of *non-refoulement*

873. Theo van Boven, the Special Rapporteur on torture, stressed the "link between the non-derogable nature of the prohibition of torture and other forms of ill-treatment and the principle of *non-refoulement*" and pointed out the imperative nature of the principle of *non-refoulement*:

> "[This principle] represents an inherent part of the overall fundamental obligation to avoid contributing in any way to a violation of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. It must be emphasized that the protection offered by the principle of non-refoulement is of an imperative nature."[1860]

874. The Government of Switzerland has explicitly characterized the principle of *non-refoulement* as peremptory norm (*ius cogens*):

> "The principle of non-refoulement as contained in article 33 of the Convention relating to the Status of Refugees of 28 July 1951 and in article 3 of the Convention for the Protection of Human Rights and Fundamental Freedom of 4 November 1950 belongs to peremptory public international law. According to the said provisions, no State may expel a refugee to the frontiers of territories where his life or freedom would be threatened because of his race, religion, nationality, membership of a particular social group or political opinions. Furthermore, it is forbidden to send individuals to States in whose territory they would be at risk of being subjected to torture, to inhuman or degrading treatment or to particularly serious human rights violations."[1861]
>
> "Now, Switzerland may not free itself from the obligations relating to non-refoulement, neither by withdrawing from the relevant treaties nor by any other juridical act. These obligations do not rest on conventions which may be denounced; according to the unanimous doctrine and jurisprudence, they derive from rules of customary international law

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[1859] General Assembly resolution 52/132, Human Rights and Mass Exoduses, 12 December 1997, preambular para. 12.

[1860] Commission on Human Rights, Civil and political rights including the questions of torture and detention, Report of the newly appointed Special Rapporteur on torture, Mr. Theo van Boven, E/CN.4/2002/137, 26 February 2002, para. 14.

[1861] Switzerland, Conseil fédéral, Message concernant l'initiative populaire «pour une réglementation de l'immigration» du 20 août 1997, *Feuille fédérale 1997*, vol. 4, p. 441, at pp. 448-449 [French original].

which have peremptory character (*ius cogens*). The majority of States, in particular all Eastern Europe and North America, recognize that the principle of non-refoulement enshrined in article 33 of the Geneva Convention relating to the Status of Refugees is a principle of customary law, and that it belongs to peremptory law."[1862]

3. Procedural requirements

875. The Convention relating to the Status of Refugees sets forth certain procedural requirements for the expulsion of a refugee who is lawfully present in the territory of a State, including (1) a decision reached in accordance with due process of law;[1863] (2) the right of the refugee to submit evidence to clear himself or herself; (3) an appeal before a competent authority; and (4) representation for purposes of the appeal. The procedural guarantees relating to the submission of evidence against the expulsion, the appeal of the expulsion decision and representation for that purpose may not apply where "compelling reasons of national security otherwise require".[1864] Article 32, paragraph 2 of the Convention provides as follows:

> "The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority."

876. The procedural guarantees that apply in cases in which the expulsion of a refugee is permitted are discussed in Robinson's commentary to the Convention, as follows:

> "Paragraph 2 provides for procedural guarantees in case of permitted expulsion. One of them is the requirement of a 'decision reached in accordance with due process of law'. This does not necessarily mean a court decision because the law may provide for an administrative procedure. 'Due process of law' means in substance only that in no case may a decision be

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[1862] Switzerland, Conseil fédéral, Message concernant les initiatives populaires «pour une politique d'asile raisonnable» et «contre l'immigration clandestine» du 22 juin 1994, *Feuille fédérale 1994*, vol. 3, p. 1471, at p. 1486 [French original].

[1863] In *Ceskovic v. Minister for Immigration and Ethnic Affairs*, Australia, Federal Court, General Division, 13 November 1979, *International Law Reports*, volume 73, E. Lauterpacht (ed.), C.J. Greenwood, pp. 627-634, an Australian court considered whether the term "due process" in Article 32 should be interpreted in the light of United States jurisprudence. It held that "the definition of 'due process' would appear to be in accordance with the rest of the paragraph quoted [paragraph 2 of Article 32], and in those circumstances 'due process' was accorded the plaintiff." Thus, reference did not need to be made to external definitions of due process, when the text of the Convention provided an adequately precise definition of what the term meant in its context.

[1864] "Being an exception, this provision is subject to restrictive interpretation." *Commentary on the Refugee Convention 1951 (Articles 32 and 33)*, Atle Grahl-Madsen, 1963, published by Division of International Protection of the Office of the United Nations High Commissioner for Refugees, 1997, para. 8 *in fine*.

> reached except as provided for in the law in force in the given country: this is clearly expressed in the French text which deals with a 'décision rendue conformément à la procedure prévue par la loi' ('a decision reached in conformity with the procedure prescribed by law'). The next procedural guarantee is that the refugee, who is accused of being a menace to national security or public order, must be given the necessary facilities to submit evidence that the accusation is unfounded, that there is an error in identity or any other evidence required to clear him of the accusation. He must furthermore be granted the right to appeal to and be represented by a counsel before the authority which, under domestic law is either called upon to hear such appeals or is the body superior to the one which has made the decision; if the decision is made by authorities from whose decision no appeal is permitted, a new hearing instead of appeal must be provided. The authority in question may assign officials to hear the presentation. However, these guarantees may be obviated by "compelling reasons of national security", for instance, when a decision must be reached in the interests of national security in such a short time as does not permit the authority to allow the refugee the necessary time to collect evidence or to transport him to the required place, or where a hearing may be prejudiced to the interests of national security (for instance, in case of espionage). Since para. 2 speaks of 'compelling' reasons, they must really be of a very serious nature and the exception to sentence one cannot be applied save very sparingly and in very unusual cases."[1865]

877. In *Pagoaga Gallastegui v. Minister of the Interior,* the French *Conseil d'Etat* considered the right of a refugee who is subject to expulsion to be granted a hearing and a right of appeal under the relevant national legislation, as follows:

> "[I]ndependently of the right to appeal against the decision to make a deportation order, which is available in the circumstances envisaged in the Law of 25 July 1952, the refugee must be heard in advance of the decision to make the order by the Special Commission set up before the Prefect by Article 25 of the Ordinance of 2 November 1945. It follows from this that the decision to make a deportation order cannot normally be taken in accordance with the law save in compliance with the procedure set out in Article 3 of the Decree of 18 March 1946, as amended by the Decree of 27 December 1950. However, an exception is made to this rule by Article 25 of the Ordinance of 2 November 1945 in cases or circumstances of the utmost urgency which make it impossible to postpone the implementation of a deportation order until after the completion of the formalities envisaged in the foregoing legislative and regulatory provisions."[1866]

[1865] Nehemiah Robinson, note 1827 above, pp. 134-135. See also Atle Grahl-Madsen, note 990 above, paras. 7-10.

[1866] *Pagoaga Gallastegui v. Minister of the Interior,* France, Conseil d'État, 27 May 1977, *International Law Reports*, volume 74, E. Lauterpacht, C.J. Greenwood (eds.), pp. 430-444.

4. Departure

(a) Opportunity to seek admission to another State

878. A refugee who is subject to expulsion may be given an opportunity to seek admission to a State other than his or her State of origin before the expulsion decision is implemented.

879. The Convention relating to the Status of Refugees requires that a refugee lawfully present in the territory of the State be allowed in the event of his or her expulsion, a reasonable period of time in order to seek legal admission in another State. Article 32, paragraph 3, provides as follows:

> "The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

880. As explained in Robinson's commentary to the convention, this provision concerns the status of a refugee after a final decision on expulsion has been taken against him. According to the same commentary, although not explicitly required by the Convention, the refugee expelled must be granted the facilities provided for in article 31, paragraph 2, of the Convention.[1867] Furthermore, the internal measures which a State Party is allowed to take during that period must not make it impossible for the refugee to secure admission elsewhere.

> "Paragraph 3 deals with the status of the refugee after a final decision of expulsion has already been taken. It does not permit the State to proceed to actual expulsion at once but enjoins it to grant him sufficient time to find a place to go. Although para. 3 does not say so explicitly, it must be assumed that the refugee must also be granted the necessary facilities prescribed in Art. 31 (2), because without such facilities no admission into another country can be obtained. The second sentence of para. 3 is less liberal than Art. 31, para. 2, first sentence: the former speaks of measures as 'they *may deem* necessary' (in French 'qu'ils jugeront opportune') while the latter mentions measures 'which *are* necessary' (in French 'qui sont nécessaires'). The difference is in the subjective appraisal of the measures: in the case of Art. 31, they must appear to be necessary to an objective observer: in that of Art. 32, it suffices if the competent authorities consider them to be required. But even so, they cannot be of such nature as to make it impossible for the refugee to secure admission elsewhere because the Convention considers expulsion a measure to be taken only if the refugee is unable to leave the country on his own motion."[1868] [Citations omitted.]

[1867] This provision, which deals with the situation of refugees unlawfully present in the territory of the State, indicates: "The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

[1868] Nehemiah Robinson, note 1827 above, pp. 135-136.

881. As noted by Grahl-Madsen, the Convention does not indicate what constitutes a "reasonable period" for purposes of article 32, paragraph 2. According to national jurisprudence, two months is not sufficient.

> "The present Convention does not indicate what would be a reasonable period. According to the judgement of the German Bundesverwaltungsgericht in Hodzic v. Land Rheinland-Pfalz a period of two months is too short."[1869]

882. As further noted by Grahl-Madsen, this provision would not apply in cases in which another State has a duty to readmit the refugee. In such a case, the refugee can be expelled without further delay.

> "The provision does not apply if another country of refuge has a duty to readmit the refugee, in which case he may be returned to that country without delay."[1870]

(b) Detention

883. The Executive Committee of the Programme of the United Nations High Commissioner for Refugees has indicated that the detention of a refugee who is subject to expulsion should be exceptional in character and should not be unduly prolonged. In its Conclusion No. 7, the Executive Committee:

> "(e) Recommended that an expulsion order should only be combined with custody or detention if absolutely necessary for reasons of national security or public order and that such custody or detention should not be unduly prolonged."[1871]

F. Stateless persons

1. Grounds and other considerations relating to the expulsion decision

884. The expulsion of aliens who are stateless persons and are lawfully present in the territory of the State is only permitted for certain grounds. The Convention relating to the Status of Stateless Persons provides special protection to stateless persons lawfully present in the territory of a State by restricting the possible grounds for their expulsion to those related to national security or public order. Article 31, paragraph 1 provides as follows:

> "1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order."

[1869] Atle Grahl-Madsen, note 990 above, para. 11.

[1870] Ibid.

[1871] Conclusion No. 7, note 1819 above.

885. Since this provision is identical to article 32, paragraph 1 of the Convention relating to the Status of Refugees, the analysis provided in Part X.E with respect to refugees is applicable, *mutatis mutandis*, to stateless persons.

886. Attention may also be drawn to the view expressed by the Institut de Droit international in 1892. According to the Institut:

> "In principle, a State must not prohibit access into or a stay in its territory either to its subjects or to those who, after having lost their nationality in said State, have acquired no other nationality."[1872]

887. Some national courts have sustained the right to expel stateless persons for reasons of national security or public order,[1873] but have also recognized the inherent practical difficulties in such expulsions.[1874] In *Brozoza's Case,* the Court of Appeal of Toulouse addressed the issue of the possibility of punishing stateless persons for their inability to comply with an order of expulsion in the following terms:

> "Brozoza has proved that he belongs to no country and that no country has any obligation to receive him, and that he is the holder of the passport of a stateless person, the so-called Nansen passport. This document can only be delivered to a stateless person. The administrative authority has recognised Brozoza as a stateless person and he ought to benefit from the provisions laid down in favour of that class of foreigner. The Convention of October

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[1872] *Règles internationales*, note 56 above, article 2.

[1873] *Expulsion Order Case,* Federal Republic of Germany, Supreme Administrative Court of Hesse, 13 November 1968, *International Law Reports*, volume 61, E. Lauterpacht (ed.), C. J. Greenwood, pp. 436-443 ("Aliens such as the plaintiff who have the legal status of a stateless individual may be expelled for serious reasons of public order and security in accordance with Article 11 *AuslG.* Such serious reasons prevail in the present proceedings.").

[1874] See *George Talma et Al. v. Minister of the Interior,* Estonia, Council of State, 14 October 1927, *Annual Digest and Reports of Public International Law Cases*, 1935-1937, H. Lauterpacht (ed.), Case No. 142, p. 313 ("The basis of the right to expel aliens is the right to ensure the safety of the realm, a right which cannot be waived as regards any category of aliens whatsoever. The fact that individuals do not possess national passports merely means that they cannot be deported forcibly to any particular State, and that they ought rather to be allowed to go to the State which has agreed to receive them."); *Brozoza's Case,* France, Cour d'Appel de Toulouse, 9 June 1937, *Annual Digest and Reports of Public International Law Cases*, 1935-1937, H. Lauterpacht (ed.), Case No. 139, pp. 308-310; *Keledjian Garabed v. Public Prosecutor*, France, Court of Appeal of Paris, 30 January 1937, Appealed to Court of Cassation; *Public Prosecutor v. Zinger,* France, Tribunal Correctionnel de la Seine, 14 November 1936, *Annual Digest and Reports of Public International Law Cases*, 1935-1937, H. Lauterpacht (ed.), Case No. 138, pp. 307-308; and *In re Kaboloeff,* France, Conseil d'État, 8 March 1940, *Annual Digest and Reports of Public International Law Cases*, 1919-1942 (Supplementary Volume), H. Lauterpacht (ed.), Case No. 104, pp. 197-198.

28, 1933, admits that the impossibility for a stateless person to leave the territory constitutes a case of *force majeure* and excludes the imposition of any punishment."[1875]

2. Procedural requirements

888. The Convention relating to the Status of Stateless Persons sets forth certain procedural requirements for the expulsion of a stateless person who is lawfully present in the State, including a decision reached in accordance with due process of law; the right of the stateless person to submit of evidence to clear himself or herself; an appeal before a competent authority; and representation for purposes of the appeal. The procedural guarantees relating to the submission of evidence against the expulsion, the appeal of the expulsion decision and representation for that purpose may not apply where "compelling reasons of national security otherwise require". Article 31, paragraph 2, provides as follows:

> "2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authorities."

889. Since this provision is identical to article 32 of the Convention relating to the Status of Refugees, the analysis provided in Part X.E above with respect to refugees is applicable, *mutatis mutandis*, to stateless persons.

[1875] *Brozoza's Case*, France, Cour d'Appel de Toulouse, 9 June 1937, *Annual Digest and Reports of Public International Law Cases*, 1935-1937, H. Lauterpacht (ed.), Case No. 139, pp. 308-310. See also *Public Prosecutor v. Zinger*, France, Tribunal Correctionnel de la Seine, 14 November 1936, *Annual Digest and Reports of Public International Law Cases*, 1935-1937, H. Lauterpacht (ed.), Case No. 138, pp. 307-308 ("Hence on his release from prison the stateless foreigner without a passport is as a rule absolutely unable to leave French territory. In the absence of legislative provisions providing for other measures, the Court has no other alternative but to sentence or acquit the accused who have been able to enter France but are unable to leave it. If sentenced, they are destined to pass a great part of their existence in detention, their position remaining exactly the same on the day of their release as on the day of their imprisonment. When in prison, a fact not without interest, they are supported at the cost of the French taxpayer. ... As this is truly the case of an offence which the accused cannot help committing, the Court, in the absence of a better remedy open to it, is of the opinion that release is the best solution from the legal point of view.") But see *Public Prosecutor v. Jacovleff*, France, Cour d'Appel de Paris, 20 July 1934, *Annual Digest and Reports of Public International Law Cases*, 1933-1934, H. Lauterpacht (ed.), Case No. 137, pp. 331-332 (Petitioner failed to show that it was impossible for him to leave France). See *In re Kaboloeff*, France, Conseil d'État, 8 March 1940, *Annual Digest and Reports of Public International Law Cases*, 1919-1942 (Supplementary Volume), H. Lauterpacht (ed.), Case No. 104, pp. 197-198 (Although it must be conceded that it was impossible for Kaboloeff to leave French territory, that circumstance cannot stand in the way of the Minister for the Interior's issuing the order appealed from).

3. Departure

890. The Convention relating to the Status of Stateless Persons requires that stateless persons who are lawfully present in the territory of the State be given, in the event of their expulsion, a reasonable period of time to seek legal admission to another State. The territorial State may impose internal measures if necessary during this period. Article 31, paragraph 3, provides as follows:

> "3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

891. Since this provision is identical to article 32, paragraph 3 of the Convention relating to the Status of Refugees, the analysis provided in Part X.E with respect to refugees is applicable, *mutatis mutandis*, to stateless persons.

G. Former nationals

892. There have been cases in which States have deprived their nationals of their nationality and expelled their former nationals as aliens.[1876] The deprivation of nationality solely for the purpose of evading a prohibition of the expulsion of nationals which may exist under national or international law may be considered unlawful.[1877] This may raise issues relating to the principle of good faith or the prohibition of abuse of rights. In a somewhat analogous situation, the European Commission of Human Rights found that a State could not refuse to confer nationality when the sole object was the expulsion of the individual.[1878]

[1876] "Examples have abounded in the past of deportations of forcibly denaturalized persons, but it is to be hoped that they are events of the past." Ivan Anthony Shearer, *Extradition in International Law*, Manchester, University Press, 1971, p. 76. "[T]he term denationalization is used to signify all deprivations of nationality by a unilateral act of a State, whether by the decision of administrative authorities or by the operation of law. In this sense, denationalization thus does not concern the legal problems connected either with renunciation of nationality, i.e. expatriation or loss of nationality resulting from a deliberate renunciation by the individual, or with substitution of nationality, i.e. automatic loss of nationality upon acquisition of another nationality." Rainer Hofmann, "Denationalization and forced exile", 1991, *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, vol. 1, 1992, pp. 1001-1007, at p. 1001.

[1877] "In so far as the prohibition to expel nationals exists, it extends to cases of denationalization, whereby a State first deprives an individual of his or her nationality and then proceeds to an expulsion. Otherwise the prohibition of expulsion could be easily circumvented." Giorgio Gaja, note 28 above, p. 292. "One means by which a state could avoid its obligations to accept the repatriation of its nationals or not to expel them is to strip them of their citizenship." Hurst Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht, Martinus Nijhoff Publishers, 1987, p. 61. As mentioned previously, the expulsion of *nationals* is beyond the scope of the present topic by its terms. *See* Part III.A.5.

[1878] "Article 3(1) of the 1963 Fourth Protocol to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms provides: 'No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.' The European Commission of

893. The expulsion of former nationals may require consideration of the lawfulness of the deprivation of nationality of an individual prior to expulsion in relation to (1) the status of an individual as a national or an alien for purposes of expulsion; (2) the validity of the ground for the subsequent expulsion (which may be related to the ground for denationalization); (3) the State of nationality, if any, that has a duty to admit this individual; (4) the destination of persons who are thereby rendered stateless; (5) the duty of a State to receive its former nationals who are expelled from another State.

1. Deprivation of nationality

894. International law would appear to recognize the possibility of the deprivation of the nationality of an individual as a matter which is in principle within the domestic jurisdiction of the State.[1879]

> "The conferment or deprivation of a nationality is the classical example of a matter which is in principle within the domestic jurisdiction of a State. That this must be so follows from the very nature of nationality as a legal, political, and social link between an individual and the State. But since nationality is essentially a claim to jurisdiction over the national, and a jurisdiction moreover not necessarily limited to territorial presence, it follows that it has an important international dimension and must therefore to some extent be a matter governed by international law. The extent of the international law dimension will depend upon the particular circumstances and also upon the stage of development of international law."[1880]

Human Rights decided in 1970 that though the Convention does not mention the right to nationality, a State cannot arbitrarily refuse to confer nationality on an individual otherwise entitled to it, if the refusal has as its sole object the expulsion of the individual [*X* v. *Federal Republic of Germany,* Appl. 3745/ 68, 31 Collection of Commissions's Decisions 107, 110]." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders,* Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 86-87.

[1879] "Existing practice and jurisprudence does not support a general rule that deprivation of nationality is illegal." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 394 (citations omitted). "At the present time the competence of States to introduce denationalization measures cannot be doubted." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 7. "In principle, the power of States to cancel or withdraw nationality is, in the absence of treaty obligations, not limited by international law…" Nationality, including Statelessness, Report by Manley O. Hudson, Special Rapporteur, *Yearbook of the International Law Commission*, 1952, vol. II, A/CN.4/50, pp. 3-12, at p. 10. "It cannot be questioned that States are entitled to provide in their laws for the loss of their nationality by their own nationals resident within their territory and, in particular, to deprive them of their nationality unilaterally." Paul Weis, *Nationality and Statelessness in International Law,* 2nd ed., Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, p. 125. "Present customary international law does not prohibit deprivation of nationality by unilateral action of the State of nationality with the exception of discriminatory denationalization based on racial or religious grounds." Rainer Hofmann, "Denationalization and forced exile", 1991, *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, at p. 1006. "Insofar as positive international law does not appear to proscribe denationalization, the latter will continue to be a major cause of statelessness." Peter A. Mutharika, *The Regulation of Statelessness under International and National Law*, New York, Oceana Publications, Inc., 1989, p. 13 (citation omitted).

[1880] Robert Y. Jennings, "International Law", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* Amsterdam, Elsevier Science Publishers, vol. 2, 1995, pp. 1159-1178, at p. 1175. "Acquisition and loss of

895. The deprivation of nationality may not be governed by a single rule of prohibition or discretion under international law as suggested by some authors. The lawfulness of the deprivation of nationality may depend on whether it conflicts with related obligations of a State under international law as discussed below:

> "In relation to the present subject-matter, writers have sometimes declared deprivation of nationality, particularly group denationalization, to be illegal. The subject is to be approached with caution and it abounds with general formulations which are obviously not in accord with practice or good policy. At the two extremes of opinion one finds the view that denationalization is illegal *tout court* and the view that denationalization is within the discretion which States have in the matter of nationality and is therefore lawful. Much will depend on the context in which the issue arises and even those alleging a rule of illegality differ as to the reasons for the rule. However, principle and existing practice give some support to and, at the least, do not contradict certain positions. If the deprivation is part and parcel of a breach of an international duty then the act of deprivation will be illegal. If the deprivation is not a part of a delictual act but merely involves denationalization of groups of citizens domiciled within the frontiers of a State, who lack any other links, then there is no delict – as there would be, for example, if they were forced to try to gain admission illegally in neighbouring States – but the deprivation is not entitled to recognition by others because it disregards the doctrine of effective link and represents an attempt to avoid the responsibilities of territorial sovereignty and statehood. However, if denationalized persons do go abroad and establish strong links with other States it may be justifiable to accept the loss of the nationality of their former home. This is not to recognize illegality but to accept the effect of changes of fact. It is perhaps not surprising that existing practice and jurisprudence do not support a general rule of illegality."[1881]

896. The deprivation of nationality by a State pursuant to its domestic jurisdiction may be subject to limitations under international law,[1882] relating to (1) the reduction of statelessness; (2) the prohibition

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nationality are in principle considered as falling within the domain of exclusive domestic jurisdiction, and are as such not subject to international law. It follows, however, from the rights and duties conferred upon States by international law that States are bound to behave in a certain manner when regulating questions of nationality." Rainer Hofmann, "Denationalization and forced exile", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, vol. 1, 1992, pp. 1001-1007, at p. 1001. "Every state possesses, in principle, exclusive competence to determine the rules relative to the acquisition and loss of its nationality. This wide discretion, however, is not unlimited, but is restricted by duties arising from agreements with other states, and by the general principles of international law." Lawrence Preuss, "International Law and Deprivation of Nationality", *Georgetown Law Journal*, vol. 23, 1934, pp. 250-276, at p. 254 (citations omitted). See also Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 373 *et seq.*; and John Fischer Williams, "Denationalization", *British Yearbook of International Law*, vol. 8, 1927, pp. 45-61, at p. 50.

[1881] Ian Brownlie, "The Relations of Nationality in Public International Law", *The British Year Book of International Law*, vol. 39, 1963, pp. 284-364, at pp. 339-340 (citations omitted).

[1882] "One must distinguish between the power of a state to denationalize its citizens, which is widely recognized …, and the possibility that such actions may nevertheless violate a state's international obligations." Hurst of the arbitrary deprivation of nationality; (3) the principle of non-discrimination; (4) evasion of international obligations; and (5) collective or mass deprivation of nationality.[1883] This question may also be addressed in national law.

(a) Reduction of statelessness

897. International law relating to the reduction of statelessness may limit the ability of a State to deprive an individual of his or her nationality when such action would create a situation of statelessness for the individual. It is important to note that deprivation of nationality does not render the individual concerned a stateless person in all cases. The individual may have retained his or her original nationality depending on the national law of the State concerned.[1884] Even if the deprivation of nationality results in a stateless individual, this may not be a sufficient basis for characterizing the action as a violation of international law.[1885]

Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht, Martinus Nijhoff Publishers, 1987, p. 51.

[1883] The Eritrea-Ethiopia Claims Commission considered the lawfulness of deprivation of nationality in wartime under customary international law. *See* Part X.H.1.

[1884] "It must not be forgotten in considering action limited to cases of *denaturalization*, that the revocation or cancellation of a naturalization certificate does not necessarily mean the rendering of a person 'stateless' in international law. If the naturalization did not involve the loss of the nationality of origin according to the law of the state of origin, denationalization means rather the correction of an anomaly of international law by the destruction in the given case of double nationality, though this is really only the correction of one anomaly by another." John Fischer Williams, "Denationalization", *British Yearbook of International Law*, vol. 8, 1927, pp. 45-61, at p. 48.

[1885] "As a rule, any act of denationalization in this sense renders the individuals concerned stateless, unless they were holding double nationality … There is, however, a growing tendency to reduce statelessness by preconditioning the validity of denationalization measures on the prior or simultaneous acquisition of another nationality. But it must be stressed that international law does not prohibit State actions resulting in statelessness, not even in cases of mass denationalization." Rainer Hofmann, "Denationalization and forced exile", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, at pp. 1001, 1006. "In so far as deprivation of nationality results in statelessness, it must be regarded as retrogressive, and the fact that some states find no need (subject to certain exceptions) to provide for deprivation of nationality suggests that no vital national interest requires it." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 880 (citations omitted). "Neither the view that denationalisation is inconsistent with international law because it creates statelessness nor the view that it encroaches upon the rights of the individual finds support in the rules of international law. Statelessness is not inadmissible under international law – although it may be considered undesirable." Paul Weis, *Nationality and Statelessness in International Law*, 2nd ed., Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, p. 125. "It is therefore not possible to say as would be the case if the reasonable law was that actually in force – that for a state to denationalize an individual who on denationalization acquires no new nationality is legally impossible as resulting in the production of something which would be a violation of positive international law in the shape of a person of no nationality." John Fischer Williams, "Denationalization", *British Yearbook of International Law*, vol. 8, 1927, pp. 45-61, at p. 52.

898. The right to nationality has been recognized in a number of human rights instruments.[1886] As early as the 1890s, efforts were made to prohibit the deprivation of nationality in the absence of the simultaneous acquisition of another nationality thereby preventing statelessness.[1887] The Convention on the Reduction of Statelessness prohibits the deprivation of nationality resulting in statelessness[1888] subject to exceptions relating to extended permanent residence abroad,[1889] nationality obtained by fraud or misrepresentation[1890] as well as pre-existing grounds of disloyalty, conduct seriously prejudicial to the vital interests of the State or repudiation of allegiance under national law.[1891] The Convention further requires that the deprivation of nationality be in accordance with law and ensures the right to a fair hearing before a court or other independent body.[1892]

[1886] The Universal Declaration on Human Rights provides in article 15, paragraph 1, as follows: "Everyone has a right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." *See* also American Convention on Human Rights, article 20 – "Right to Nationality" ("1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it."); Convention on the Rights of the Child, New York, 20 November 1989, United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3, article 7 ("1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.") and article 8, para. 1 ("States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.")

[1887] "Learned societies of international law adopted numerous resolutions to prohibit denationalization, again linking its admissibility with the simultaneous acquisition of another nationality." Rainer Hofmann, "Denationalization and forced exile", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, at p. 1003. "No one can lose or give up his nationality unless he justifies that he fulfils the conditions required for admission into another State. Denationalization can never be imposed as a penalty." Résolutions adoptées par l'Institut de Droit international en séance du 29 septembre 1896, relativement aux conflits de lois en matière de nationalité (naturalisation et expatriation), art. 6, *Annuaire de l'Institut de Droit international*, vol. 15, 1896, p. 271 [French original]. "No one can lose his nationality without acquiring a foreign nationality." *Institut de Droit international*, vol. 34, 1928, p. 760, article 2 [French original]. See also the "Proposed Nationality Rules in Connection with Statelessness", *Transactions of the Grotius Society*, vol. 28, 1943, p. 157, cited by Rainer Hofmann, "Denationalization and Forced Exile", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, vol. 1, 1992, pp. 1001-1007, at p. 1003.

[1888] "A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless." Convention on the Reduction of Statelessness, New York, 30 August 1961, United Nations, *Treaty Series*, vol. 989, No. 14458, at p. 179, article 8, para. 1

[1889] Ibid., pp. 178-179, article 7, paras. 4 and 5, and article 8, para. 2(a).

[1890] Ibid., p. 179, article 8, para. 2(b).

[1891] Ibid., p. 179, article 8, para. 3.

[1892] "A Contracting State shall not exercise a power of deprivation … except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body." Convention

(b) Prohibition of arbitrariness

899. The prohibition of the arbitrary deprivation of nationality is recognized in some human rights instruments.[1893] The Universal Declaration of Human Rights provides in article 15, paragraph 2, as follows: "[n]o one shall be arbitrarily deprived of his nationality ..."[1894] The view has been expressed that the deprivation of nationality for the purpose of the expulsion of a person would be contrary to the prohibition of the arbitrary deprivation of nationality contained in the Universal Declaration.[1895]

900. The American Convention on Human Rights provides in article 20, paragraph 2, as follows: "[n]o one shall be arbitrarily deprived of his nationality ..." The right to nationality is included in the enumeration of non-derogable rights contained in article 20 of the Convention.[1896] Moreover, the Inter-American Commission on Human Rights has found denationalizations contrary to the right of nationality.[1897]

901. The prohibition of arbitrariness would seem to indicate that a State must have a valid ground for the deprivation of nationality. The view has also been expressed that there are a number of possible grounds for the deprivation of nationality under national law.

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on the Reduction of Statelessness, New York, 30 August 1961, United Nations, *Treaty Series*, vol. 989, No. 14458, p. 179, Article 8, para. 4. "What has marked the cases mentioned at the start of this article is precisely the absence of any hearing before a tribunal for the determination of this very important if not fundamental right, in our present world composed of sovereign States... If an alien cannot be expelled from the territory of a State without being given the right to defend himself, how much more should that apply to a national whose nationality is to be removed in order to expel." Niall MacDermot (ed.), "Loss of Nationality and Exile", *The Review: International Commission of Jurists*, No. 12, 1974, pp. 22-27, at pp. 24-25.

[1893] "A final limitation is that denationalization cannot violate treaty obligations which the denationalizing state has accepted. Here the various multilateral human rights treaties are obviously relevant, although if one looks solely at the right to a nationality rather then the right to return to one's country, only the American Convention on Human Rights and the Universal Declaration of Human Rights prohibit the arbitrary deprivation of nationality." Hurst Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht, Martinus Nijhoff Publishers, 1987, p. 62 (citation omitted).

[1894] General Assembly resolution 217 (III), International Bill of Human Rights: Universal Declaration of Human Rights, 10 December 1948, article 15, para. 2.

[1895] "Under that provision, a State is prohibited from depriving a person of his or her nationality, and combining it with an expulsion of that person or using it later as an excuse for expulsion." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 85 (referring to article 15, paragraph 2, of the Universal Declaration).

[1896] American Convention on Human Rights, article 20, para. 3; and article 27, para. 2.

[1897] Third Report on the Situation of Human Rights in Chile, Chapter III, para. 19, OAS/Ser.L/V/II.40, doc. 10, 11 February 1977.

> "According to the law of many states, certain conduct by a national results in him being deprived of his nationality. The laws of the various states recognise numerous grounds for depriving a person of his nationality, such as entering into foreign civil or military service without permission of his national state, voting in political elections in a foreign state, committing acts of treason against the state or desertion from its armed forces, making false statements in applying for naturalisation, and prolonged residence abroad (particularly if in order to evade public service obligations), and becoming naturalised in a foreign state. There would not seem to be anything contrary to international law in a state depriving its nationals of their nationality on such grounds."[1898]

(c) Principle of non-discrimination

902. Deprivation of nationality may be further limited by the principle of non-discrimination.[1899] The Convention on the Reduction of Statelessness prohibits denationalization based on racial, ethnic,

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[1898] Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 878 (citations omitted). "A number of grounds for denationalisation have been created which are common to many systems, although one cannot speak of uniform legislation." Paul Weis, *Nationality and Statelessness in International Law*, 2nd ed., Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, p. 118. In this regard, Weiss notes that national laws recognize several grounds for denationalization such as: the failure to register with a diplomatic or consular representative, entry into foreign civil or military service, acceptance of foreign distinctions, disloyal conduct, acquisition of nationality by fraud, departure or sojourn abroad, conviction for certain crimes, political attitude or activities, racial and national grounds. See also International Law Commission, National Legislation Concerning Grounds for Deprivation of Nationality, Memorandum prepared by Ivan S. Kerno, A/CN.4/66, 6 April 1953. This study refers to the following grounds for denationalization: voluntary acquisition of another nationality; joining the army of another State, receiving a commission, pension, title or honors from another State or joining its public service; residence abroad for a specified period; the situation of a person born a national but born abroad and never sojourning or residing in the country or applying to keep the nationality after a stated period of time; accepting double nationality; fraud or mistake in naturalization; conviction of a serious crime, as well as various activities or behaviours against the public interest or the security of the State. In contrast, the view has been expressed that the deprivation of nationality should be imposed only as penalty for the commission of a serious offence when such a penalty is provided for in the relevant national law. "What is evident is that loss of nationality is a penalty which can have serious consequences for the individual concerned. Belonging to a state, and having its nationality, is the basis for a multitude of other rights and privileges. It would appear to be a matter of elementary justice that a penalty of a character that could be serious, should not be invoked unless the individual has committed some serious offence for which the law provides this penalty." Richard Plender, "The Ugandan Crisis and the Right of Expulsion under International Law", *The Review: International Commission of Jurists*, No. 9, 1972, pp. 19-32, at p. 23. For a discussion of the historical development of the law relating to denationalization which initiallv was used "almost exclusively as a penal measure for certain crimes," see Rainer Hofmann, "Denationalization and forced exile", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, at p. 1001. However, the Institut de Droit International adopted a resolution in 1896 providing that "denationalisation can never be imposed as a penalty." "Résolutions adoptées par l'Institut de Droit international en séance du 29 septembre 1896, relativement aux conflits de lois en matière de nationalité (naturalisation et expatriation)", art. 6, *Annuaire de l'Institut de Droit international*, vol. 15, 1896, p. 271 [French original].

[1899] "A second restriction, perhaps more widely accepted, is that denationalization in the post-1945 era cannot be exercised in a manner contrary to the general principle of non-discrimination which has now become religious or political grounds.[1900] It has been suggested that the prohibition of discriminatory denationalization on racial and religious grounds is now an established rule of international law.[1901] It has also been suggested that discriminatory denationalization on other grounds referred to in the Charter of the United Nations, namely, gender or linguistic grounds, may also be prohibited.

> "Considering that the principle of non-discrimination may now be regarded as a rule of international law or as a general principle of law, prohibition of discriminatory denationalisation may be regarded as a rule of present-day general international law. This certainly applies to discrimination on the ground of race which may be considered as contravening a peremptory norm of international law but also, in the present writer's view, to discrimination on the other grounds mentioned in the Charter of the United Nations, *i.e.*, sex, language and religion."[1902]

903. In 1982, Sweden complained to Poland about the denationalization and expulsion of Polish nationals as contrary to the prohibition of racial discrimination since many of the individuals were gypsies.

> "One recent example may be given where a State has protested against the expulsion and denationalization of its nationals by another State. In March 1982 the Swedish Foreign Minister, Mr. Ola Ullsten, called the Polish Ambassador in Stockholm to the Foreign Ministry and issued a strong protest against the Polish expulsion of forty-five Poles, thirty-three in the last month, to Sweden. Half of them were deprived of Polish nationality, the others were put on the ferry to Ystad, Sweden, with documents that precluded their return to Poland. Many were

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entrenched as part of customary international law." Hurst Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht, Martinus Nijhoff Publishers, 1987, p. 62 (citation omitted).

[1900] "A Contracting State may not deprive any person or group of persons of nationality on racial, ethnic, religious or political grounds." Convention on the Reduction of Statelessness, New York, 30 August 1961, United Nations, *Treaty Series*, vol. 989, No. 14458, at p. 179, Article 9.

[1901] "As the principle of non-discrimination on grounds of race and religion may be considered as a rule of present-day international law, the prohibition of discriminatory deprivation of nationality on racial or religious reasons as provided for by Art. 9 should be regarded as limiting the exclusive jurisdiction of States to withdraw nationality… Similar studies on the relevant State practice seem to prove that States in fact rarely resort to denationalization on racial or religious grounds, whereas denationalizations for political reasons appear to be still a rather widespread phenomenon". Rainer Hofmann, "Denationalization and forced exile", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, at p. 1004.

[1902] Paul Weis, *Nationality and Statelessness in International Law*, 2nd ed., Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, p. 125. "A second restriction, perhaps more widely accepted, is that denationalization in the post-1945 era cannot be exercised in a manner contrary to the general principle of non-discrimination which has now become entrenched as part of customary international law." Hurst Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht, Martinus Nijhoff Publishers, 1987, p. 62 (citations omitted).

gypsies. The Swedish Foreign Office referred to manifest racial discrimination, and the Foreign Minister stated that this practice conflicts with all the rules of international relations."[1903]

(d) Evasion of international obligations

904. The view has been expressed that the deprivation of the nationality of a person by a State in order to avoid its obligations under international law may be unlawful in certain circumstances.

> "Delictual responsibility for damage arising from activities of persons on state territory will exist whether the delinquents are nationals or not. However, many important duties of a specific nature are prescribed by reference to nationals of a state … Yet obviously *ad hoc* denationalization would provide a ready means of evading these duties. In appropriate circumstances responsibility would be created for the breach of a duty if it were shown that the withdrawal of nationality was itself a part of the delictual conduct, facilitating the result."[1904]

(e) Mass deprivation of nationality

905. International law may further limit the ability of a State to impose massive or large scale deprivations of nationality.[1905] Although the origins of the individual denationalizations may be traced to ancient Rome, mass denationalization is a relatively recent phenomenon which occurred for the first time in the early 1900s. During the twentieth century, some States resorted to mass denationalization for political or economic reasons as a consequence of revolution, war or decolonization. Mass denationalization was carried out by the Soviet Union in the 1920s; Italy in the 1920s and 1930s; Germany in the 1930s and 1940s; Czechoslovakia in the 1940s; Yugoslavia in the 1940s; Uganda in the 1960s; and South Africa in the 1950s and 1970s.[1906] It has been suggested that

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[1903] Ruth Donner, *The Regulation of Nationality in International Law*, 2nd ed., New York, Transnational Publishers, Inc., 1994, p. 158 (citing Hufvudstadsbladet, 19 and 27 March 1982).

[1904] Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 387 (citations omitted). "Now, international law clearly permits the revocation of nationality in certain circumstances, but the governing principle is that a State may not manipulate its competence in order to avoid its international obligations." Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978. See also Paul Weis, *Nationality and Statelessness in International Law*, 2nd ed., Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, pp. 123-124.

[1905] "Denationalization may thus concern an individual or a specified group of individuals, which in the latter case amounts to so-called collective or mass denationalization …" Rainer Hofmann, "Denationalization and forced exile", in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, at p. 1001. "Such large scale deprivations of nationality raise more difficult questions of their compatibility with international law and the extent to which they should be recognised by other states, but the tendency has been to regard such denationalisation as effectively causing loss of nationality." Robert Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 879 (citations omitted).

[1906] Rainer Hofmann, "Denationalization and forced exile", in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, at pp. 1001-1002 the practice of mass denationalization was the impetus for questioning the validity of denationalization as a matter of international law.

> "When, however, certain States resorted to mass denationalization for political reasons, this was alleged to be inconsistent with international law. It has been said that such action by States was an abuse of rights as it was an attempt by the State of nationality to evade the duty of receiving back their nationals and would thus cast a burden on other States, or that it was irreconcilable with the notion of the individual as a person before the law. […] The extent to which mass denationalization is prohibited by international law is not clear."[1907]

906. The legal issues and possible emerging norms with respect to the mass or collective deprivation of nationality, particularly when accompanied by expulsion, have been discussed as follows:

> "Notwithstanding the rule of international law prohibiting such expulsions, there have been a number of instances of expulsion of nationals on an individual or a collective basis against certain classes of citizens. In several of these cases States have resorted to the practice of depriving a person of his nationality in order to circumvent the rule that a State could not expel its nationals. In most recent years, some countries in Africa have resorted to large scale expulsions of their nationals of Asian origin.
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> "There are exceptions to the rule that a State cannot expel or deport its own nationals or that a citizen cannot be deprived of his or her nationality prior to the making of a deportation order. For instance, in the case of a naturalized person whose citizenship was

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(citations omitted from text). The omitted citations are as follows: Ordinance regarding Union Citizenship of October 29, 1924, No. 202; Union Citizenship Law of November 13, 1925, No. 58; *Tcherniak v. Tcherniak*, Swiss Federal Tribunal, Decision of June 15, 1928, Official Collection of Decisions, Vol. 54 II, p. 225, Annual Digest, 1927-28, Case No. 39; *Lempert v. Bonfol*, Swiss Federal Tribunal, Decision of June 15, 1934, Official Collection of Decisions, Vol. 60 I, p. 67, Annual Digest, 1933-34, Case No. 115; and cf. *Bek-Marmatsheff v. Koutsnetskoff*, France, Tribunal de la Seine, March 7, 1929, *Revue de Droit International Privé*, vol. 24, 1929, pp. 297-307. *See also* Yash P. Ghai, "Expulsion and Expatriation in International Law: The Right to Leave, to Stay, and to Return", *American Society of International Law Proceedings*, vol. 67, 1973, pp. 122-126, at p. 126; Hans Von Mangoldt, "Stateless persons", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 656-660, at p. 657; and Eckart Klein, "South African Bantustan Policy", *Encyclopedia of Public International Law*, vol. 4, 2001, pp. 477-480.

[1907] Nationality, including Statelessness, Report by Manley O. Hudson, Special Rapporteur, *Yearbook of the International Law Commission*, 1952, vol. II, A/CN.4/50, pp. 3-12, at p. 10. "In the case of mass denationalization, on the other hand, there has been much discussion as to the consistency of such State action with international law. In some cases, State practice did not recognize Soviet and Nazi deprivations of nationality as valid under international law. The prevailing opinion and practice, however, seem to adhere to the principle that the nationality of a person must be determined in accordance with the domestic law of the State concerned and hence do not deny the validity under international law of arbitrary denationalizations." Hans Von Mangoldt, "Stateless persons", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 4, 2001, pp. 656-660, at p. 657.

obtained by fraud or misrepresentation, and who in addition had indulged in activities prejudicial to the State in violation of the oath of allegiance taken at the time of naturalization, a State may issue an expulsion or deportation order after depriving the person concerned of its nationality. …

"There is an emerging norm of international law that a State's expulsion of large numbers of its own people is a violation of international human rights law and of obligations regarding friendly relations between States. A mass expulsion by a State of its nationals constitutes a gross violation of the rule against individual expulsions. A mass expulsion imposes heavy burdens on the neighbors of the expelling State, and may even lead to an armed conflict, as in the case of East Pakistan, where a flood of persons to India resulted in a military intervention of India and the establishment of Bangladesh. International law is evolving to stop these kind of dangerous situations before it is too late. The prohibition of mass expulsion of citizens is a step in the right direction; and it would seem to be equitable that international law should impose an obligation on the expelling State to compensate the country hosting the expelled thousands or even millions of people, especially when the host country is a poor developing country.

"This emerging norm derives more from other areas of conventional and customary international human rights law than refugee law. Emergence of theories of State responsibility reflects the desire of the international community to halt flows of refugees and to establish grounds for burden-sharing among States. There is, however, no international machinery to enforce these principles, except in such special situations as the treatment by Iraq of the Kurdish and Shiite elements of its population after the Gulf War."[1908]

(f) National law

907. National legal systems vary in the extent to which a national may be deprived of his or her nationality and concerning the permissible grounds for such action.[1909] While the national laws of a

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[1908] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 87-88.

[1909] "Whereas some States make no provision for denationalization in their legislation, others have developed a number of statutory grounds which are common to many legal systems. However, one cannot speak of uniform legislation, nor may such grounds be considered as universally accepted … These grounds include: entry into foreign civil or military service, or acceptance of foreign distinctions; departure or sojourn abroad; conviction for certain crimes; political attitude or activities; racial and national grounds." Rainer Hofmann, "Denationalization and forced exile", 1991, in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, p. 1001. "In addition to mass denationalization, individual denationalization does occur under most municipal legislations either as punishment or by operation of law. Some grounds of the former may be evading military service, holding an office of a political character with a foreign government without the permission of one's government, refusal to withdraw one's services with a foreign government after being requested to do so by one's government, and engaging in activities which are detrimental to the domestic or external security of one's country. Among grounds of the latter may be prolonged residence abroad." Peter A. Mutharika, *The Regulation of Statelessness under International and National Law*, New York, Oceana Publications, Inc., 1989, p. 13 (citations omitted).

number of States provide for deprivation of nationality,[1910] the national laws of other States do not provide for such a possibility,[1911] prohibit such a possibility, or limit it to individuals who have become nationals by means of naturalization rather than by birth.[1912]

908. The national laws of some States provide for expulsion upon the loss of the State's citizenship when the alien's right to stay or reside in the State is not separately established.[1913] A State may likewise expel former nationals who renounced their citizenship for reasons which the State does not approve.[1914]

2. Grounds and other considerations relating to the expulsion decision

(a) Grounds

909. Attention may be drawn to the view expressed by the International Law Association, according to which denationalization and denial of citizenship to a person born in the country pursuant to *ius sanguinis* are not *per se* valid grounds for the expulsion of that person.

[1910] "National legal systems commonly provide for deprivation of nationality in certain circumstances, and current State practice does not support any general rule prohibiting such measures" Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 8. "Nor is the right or claim of the state to denationalize limited to cases of nationality acquired by naturalization." John Fischer Williams, "Denationalization", *British Yearbook of International Law*, vol. 8, 1927, pp. 45-61, at p. 53.

[1911] "Some States make no provision for deprivation of nationality in their legislation. These States are China, Colombia, Denmark, Ethiopia, Federal Republic of Germany, Japan, Liechtenstein, (except if acquired by fraud) Norway, Siam, Sweden, Uruguay, and the Vatican City." Paul Weis, *Nationality and Statelessness in International Law*, 2nd ed., Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, p. 118.

[1912] "Other States provide for the deprivation of nationality of naturalised subjects only (denaturalisation), *e.g.*, Great Britain and the other member States of the Commonwealth … and Venezuela." Paul Weis, *Nationality and Statelessness in International Law*, 2nd ed., Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, p. 118. "Under the laws of some States, the authorities have wider powers to deprive nationals who have acquired the nationality concerned by naturalization, of their nationality (denaturalization) than in the case of born nationals." Nationality, including Statelessness, Report by Manley O. Hudson, Special Rapporteur, *Yearbook of the International Law Commission*, 1952, vol. II, A/CN.4/50, pp. 3-12, at p. 10. "Fourthly, the practice in East Africa has shown that there is no real protection against deprivation of citizenship and therefore the emergence of a class of stateless persons. The domestic legislation of these countries [East African countries of Kenya, Tanzania and Uganda] prohibits governments from depriving a citizen of citizenship acquired through birth. In relation to those who were registered or naturalized…, however, the governments can take away such citizenship without giving any reasons and there appears to be no mechanism of review or appeal. There is no doubt that practice in East Africa goes against the Convention on the Elimination of Statelessness." Yash P. Ghai, "Expulsion and Expatriation in International Law: The Right to Leave, to Stay, and to Return", *American Society of International Law Proceedings*, vol. 67, 1973, pp. 122-126, at p. 126.

[1913] Argentina, 2004 Act, article 62(a); Bosnia and Herzegovina, 2003 Law, article 57(1)(d); Canada, 2001 Act, article 40(1)(d); Japan, 1951 Order, article 22-2; and United States, INA, section 246(b).

[1914] United States, INA, section 212(a)(10)(E).

> "Neither denationalization nor denial of citizenship to persons born in the receiving State pursuant to jus sanguinis may be invoked as a legitimate ground *per se* for deportation, expulsion or refusal of return."[1915]

(b) Destination

(i) Expulsion by the former State of nationality

910. The expulsion of a former national from the former State of nationality may present a problem in terms of admissibility to another State if the person is stateless.[1916] In the absence of a State of nationality, no State may have a duty or be willing to admit this person.

(ii) Expulsion by a third State

911. The expulsion of the former national from a third State raises similar problems. In such a case, it may be necessary to consider whether the former State of nationality has a duty to admit its former nationals. The right of a person to return to his or her own country under the relevant human rights instruments may be broadly interpreted to include a former State of nationality.[1917] Furthermore, the former State of nationality may have a duty to admit its former national in order to avoid depriving a third State of its right to expel aliens from its territory.[1918] Moreover, the deprivation of the nationality

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[1915] International Law Association, Declaration of principles of international law on mass expulsion, 62nd conference of the ILA, Seoul, 24-30 August 1986, *Conference Report 1986*, pp. 13-18, at p. 17, Principle 15.

[1916] "There will be general agreement that a state cannot, whether by banishment or by putting an end to the status of nationality, compel any other state to receive one of its own nationals whom it wishes to expel from its own territory." John Fischer Williams, "Denationalization", *British Yearbook of International Law*, vol. 8, 1927, pp. 45-61, at p. 61. *See* Part X.F.

[1917] *See* below.

[1918] "A distinction has to be drawn between the power of States to withdraw nationality and the effect of withdrawal on the duty of a State to grant its nationals a right of residence and to receive them back in its territory. It has been contended that this duty persists after the withdrawal of nationality." Nationality, including Statelessness, Report by Manley O. Hudson, Special Rapporteur, *Yearbook of the International Law Commission*, 1952, vol. II, A/CN.4/50, pp. 3-12, at p. 10. "One writer asserts that 'the view is widely held ... that a State may not unilaterally shirk its duty of admission by depriving its national of his nationality. In spite of expatriation this duty remains in force, at least in so far as the individual concerned did not acquire another nationality'. Weis agrees that this is 'the most serious argument in favour of the alleged rule' against denationalization, although he is not persuaded." Hurst Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht, Martinus Nijhoff Publishers, 1987, p. 62 (quoting H.F. Van Panhuys, The Role of Nationality in International Law (1959), p. 57) (citing Paul Weis, *Nationality and Statelessness in International Law*, 2nd ed., Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, at p. 45). "In the case of denationalisation i. e. deprivation of nationality, the duty of readmission after the loss of nationality survives." S.K. Agrawala, *International Law Indian Courts and Legislature*, Bombay, N.M. Tripathi Private Ltd., 1965, p. 104. "Whereas international law recognizes a duty of a State to admit its nationals expelled from the territory of another State, it seems doubtful whether such an obligation exists as regards former nationals, in particular persons having lost their nationality by unilateral action of the State concerned. It has been argued that since States are under no of a person who is present in the territory of a third State has been described as an abuse of power or *excès de pouvoir* because of the burden imposed on the territorial State with respect to the continuing presence of an alien.[1919]

912. As discussed previously,[1920] the right of persons to enter or return to *their own country* is recognized in the Universal Declaration of Human Rights;[1921] the International Covenant on Civil and Political Rights;[1922] and the African Charter on Human and Peoples' Rights.[1923] In contrast, this right

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obligation to permit aliens to reside on their soil, the good faith of the State which had admitted an alien, on the assumption that the State of his nationality would readmit him if expelled, would be deceived if this duty were to be extinguished by subsequent denationalization (Fischer Williams, Lessing, Preuss). An examination of the practice of States, including their treaty practice, shows, however, that customary international law does not impose on the State of former nationality a duty of readmission. This was manifested by the proceedings of the Hague Codification Conference of 1930 relating to nationality (Acts of the Hague Conference for the Codification of International Law, Vol. 2, Minutes of the First Committee: Nationality, LoN Doc. No. C.351(a).M.145(a).1930.V) and explains the existence of repatriation treaties (e.g. Convention between Belgium and the Netherlands concerning Assistance to and Repatriation of Indigent Persons, of May 15, 1936, LNTS, Vol. 179, p. 141)." Rainer Hofmann, "Denationalization and forced exile", *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 1001-1007, at p. 1005. "It should be noted, however, that the duty of states to receive back such expelled persons is limited to nationals; the duty does not extend to individuals who have been deprived of their nationality. Hence states may deprive their own nationals of citizenship or nationality and then proceed to expel persons denationalized in this manner as aliens. Attempts to forbid this practice – which frequently leads to statelessness have not been successful." Hans Kelsen, *Principles of International Law* (Revised and Edited by Robert W. Tucker), 2nd ed., Holt, Rinehart and Winston, Inc, 1966, p. 373, n. 73 (citation omitted).

[1919] "Where exile, or expulsion, is followed by deprivation of the nationality of the persons so excluded then such deprivation may be in the nature of an abuse or rights or *excès de pouvoir,* for the status of those so deprived changes from that of aliens to stateless persons in the territory of the receiving State." Ruth Donner, *The Regulation of Nationality in International Law*, 2nd ed., New York, Transnational Publishers, Inc., 1994, p. 153. Some states have attempted to manipulate the application of their nationality laws in order to defeat repatriation of nationals through denationalization, but such measures have usually been condemned by the international community, sometimes under the doctrine of "abuse of rights." David A. Martin, "The Authority and Responsibility of States" *in* T. Alexander Aleinikoff and V. Chetail (eds.), Migration and International Legal Norms, The Hague, T.M.C. Asser Press, 2003, pp. 31-45, at p. 41.

[1920] *See* Part VII.C.1(b).

[1921] General Assembly resolution 217 (III), International Bill of Human Rights: Universal Declaration of Human Rights, 10 December 1948, Article 13, para. 2: "Everyone has the right to leave any country, including his own, and to return to his country."

[1922] General Assembly resolution 2200 (XXI), International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, Article 12, para. 4: "No one shall be arbitrarily deprived of the right to enter his own country."

[1923] African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, United Nations, *Treaty Series*, vol. 1520, No. 26363, Article 12, para. 2, at p. 248: "Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality."

is recognized with respect to the *State of nationality* in Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms,[1924] and in the American Convention on Human Rights.[1925]

913. The Human Rights Committee has considered the meaning of the phrase "his own country" contained in article 12, paragraph 4, of the International Covenant. In its general comment No. 27, the Human Rights Committee indicated that the phrase "his own country" is broader than the "country of nationality" since it includes situations in which an individual, although not a national of a country, has "close and enduring connections" with the latter. The Human Rights Committee expressed the view that the deprivation of nationality does not deprive a person of the right to enter his or her own country. [1926]

> "20. The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ('no one'). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country". [Citation omitted.] The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law …
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> "21. In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and

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[1924] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, note 55 above, Article 3, para. 2: "No one shall be deprived of the right to enter the territory of the state of which he is a national." The European Court of Justice has recognized the right of entry to the State of nationality as follows: "it is a principle of international law … that a State is precluded from refusing to its own nationals the right of entry or residence." *Van Duyn v. Home Office*, Case 41/74, Judgment of the Court, [1974] E.C.R. 1337, [1975] 1 C.M.L.R. 1, 18, 4 December 1974 (This case concerned freedom of movement for employment purposes rather than expulsion.)

[1925] American Convention on Human Rights, "Pact of San José, Costa Rica", San José (Costa Rica), 22 November 1969, United Nations, *Treaty Series*, vol. 1144, No. 17955, Article 22, paragraph 5, at p. 151: "No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it."

[1926] "Thus, denationalization *per se* may not be a violation of international human rights law as it presently stands … Nevertheless, where denationalization is arbitrary and is accompanied by expulsion or denial of the right to return, it may well violate principles of international law concerning the territorial supremacy of states as well as individual human rights." Hurst Hannum, *The Right to Leave and Return in International Law and Practice,* Dordrecht, Martinus Nijhoff Publishers, 1987, pp. 62-63. "Some nation-States use decrees of denationalization to deny the right of entry of their own nationals." "Remarks by Lung-Chu Chen", *ASIL Proceedings*, vol. 87, 1973, pp. 127-132, at p. 131.

> objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country."[1927]

914. The refusal of the former State of nationality to admit its former national may preclude the right of the territorial State to expel the alien if no other State is willing to admit the person.[1928]

> "The effective expulsion of an alien normally calls for co-operative acquiescence by the State of which he is a national. Thus it is generally deemed to be its duty to receive him if he seeks access to its territory. Nor can it well refuse to receive him if during his absence from its domain he has lost its nationality without having acquired that of another State. Conversely, it is not apparent how a State, having put an end to the nationality of an individual owing allegiance to itself, may reasonably demand that any other State whose nationality he has not subsequently acquired, shall receive him into its domain when attempt is made as by banishment to cause him to depart the territory of the former. It may be greatly doubted whether a State is precluded from expelling an alien from its domain by the circumstance that he has been denationalized by the country of origin and has subsequently failed to attain the nationality of any other. No international legal duty rests upon the State which has recourse to expulsion to allow the alien to remain within its limits until a particular foreign State evinces willingness to receive him within its domain." [1929]

[1927] Human Rights Committee (International Covenant on Civil and Political Rights), General Comment No. 27: Freedom of Movement (Article 12), 2 November 1999, paras. 20-21.

[1928] "It cannot be concluded that the refusal to receive is countenanced by international law. There is no dissent from the proposition that every state possesses the power of expulsion, as the corollary to its right to determine the conditions for entry upon its territory. This right is destroyed if another state refuses to fulfil the conditions which it presupposes, and which are essential to its exercise." Lawrence Preuss, "International Law and Deprivation of Nationality", *Georgetown Law Journal,* vol. 23, 1934, pp. 250-276, at p. 272 (referring to the duty of a State to receive its former nationals who are stateless). "In addition to the effect of denationalization and exile on the individual concerned, it has effects on other States by the resulting status of statelessness imposed on the individual. Other States find themselves either in the position of being forced to grant residence to a person not their national or forcing that person to remain in constant motion between States, until some Government relents." Niall MacDermot (ed.), "Loss of Nationality and Exile", *The Review: International Commission of Jurists*, No. 12, 1974, pp. 22-27, at p. 23.

[1929] Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, pp. 231-232 (citations omitted). "There will also be general agreement that a state is bound to receive back across its frontiers any individual who possesses its nationality or who is one of its 'ressortissants.' If so, it follows that while positive international law does not forbid a state unilaterally to sever the relationship of nationality so far as the individual is concerned, even if the person affected possesses or acquires no other nationality, still a state cannot sever the tie of nationality in such a way as to release itself from the international duty, owed to other states, of receiving back a person denationalized who has acquired no other nationality, should he be expelled as an alien by the state where he

915. The 1930 Special Protocol concerning Statelessness addresses the duty of a State to admit its former national who is stateless in articles 1 and 2 as follows:

> "1. If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose nationality he last possessed is bound to admit him, at the request of the State in whose territory he is:
>
> "(i) if he is permanently indigent either as a result of an incurable disease or for any other reason; or
>
> "(ii) if he has been sentenced, in the State where he is, to not less than one month's imprisonment and has either served his sentence or obtained total or partial remission thereof.
>
> "In the first case the State whose nationality such person last possessed may refuse to receive him, if it undertakes to meet the cost of relief in the country where he is as from the thirtieth day from the date on which the request was made. In the second case the cost of sending him back shall be borne by the country making the request."[1930]

916. The Institut de Droit International also expressed the view that a State could not deny access to its former nationals who had been rendered stateless. In 1892, the Institut adopted the following provision:

> "In principle, a State must not prohibit access into or a stay in its territory either to its subjects or to those who, after having lost their nationality in said State, have acquired no other nationality."[1931]

H. Enemy aliens

917. The term "enemy alien" may be used to refer to aliens who are nationals of opposing States during an armed conflict.[1932] The expulsion of aliens, especially large numbers of aliens, is perhaps most likely to occur in such situations.[1933]

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happens to be." John Fischer Williams, "Denationalization", *British Yearbook of International Law*, vol. 8, 1927, pp. 45-61, at p. 61.

[1930] Special Protocol concerning Statelessness, The Hague, 12 April 1930, *International Legal Materials*, vol. 13, 1974, p. 1. Article 2 provides, *inter alia*, as follows: "The inclusion of the above-mentioned principles and rules in the said article shall in no way be deemed to prejudice the question whether they do or do not already form part of international law."

[1931] *Règles internationales*, note 56 above, article 2 [French original].

[1932] "The outbreak of war makes alien enemies of the respective subjects of the belligerents." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 61.

[1933] "The power of expulsion or deportation must be regarded as an extraordinary power to be exercised only in exceptional circumstances. Except in times of war or imminent danger, States usually exercise the powers of

1. Deprivation of nationality

918. The possible relation between deprivation of nationality and expulsion has been discussed in Part III.A.6. Attention is drawn here to the rules of international law relating to the deprivation of nationality within the context of an armed conflict.

919. The Eritrea-Ethiopia Claims Commission considered whether the deprivation of nationality in the context of the emergence of a new State and an armed conflict violated international law. The Commission noted that this issue was not governed by international humanitarian law or any treaty applicable between the States during the war. The Commission therefore addressed the issue under customary international law relating to the deprivation of nationality in time of war.

920. The Commission addressed the substantive requirements for the deprivation of nationality under customary international law. The Commission applied the prohibition of *arbitrary* deprivation of nationality as recognized in article 15 of the Universal Declaration of Human Rights. The Commission considered a number of factors in determining whether the deprivation of nationality was arbitrary in particular cases, including: "whether the action had a basis in law; whether it resulted in persons being rendered stateless; and whether there were legitimate reasons for it to be taken given the totality of the circumstances."[1934]

921. The Commission also addressed the procedural requirements for the deprivation of nationality under customary international law. The Commission found that in principle the procedure should provide the affected persons with the following: adequate information regarding the proceedings; the opportunity to present their cases to an objective decision maker; and the opportunity to seek an objective outside review.[1935]

922. The Commission considered these substantive and procedural requirements in the context of the exceptional circumstances of the emergence of a new State following by the outbreak of war. The Commission noted that Ethiopia had "devised and implemented a system applying reasonable criteria to identify individual dual nationals thought to pose threats to its wartime security".[1936] The Commission found that the deprivation of the nationality of individuals identified through this process was not arbitrary and contrary to international law under the exceptional wartime circumstances. In other instances, the deprivation of nationality of individuals which did not conform to this process was found to be unlawful.

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expulsion and deportation against aliens rather sparingly." Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, pp. 89-90.

[1934] *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, para. 60 quoted in full below.

[1935] Ibid., para. 71 quoted below.

[1936] Ibid., para. 72 quoted in full below.

923. The Commission took into account the special considerations that may apply in time of armed conflict involving a change in the territory of a State with respect to the possible threat to the national security of the State posed by the presence of dual nationals who are nationals of the territorial State as well as nationals of an opposing State. Whereas the presence of such aliens in the territory of a party to the conflict may provide sufficient grounds for depriving them of the nationality of the territorial State, the same may not be true with respect to dual nationals who are present in the territory of a State which is not a party to the conflict.

924. The Commission also took into account the practical difficulties that may be encountered in complying with procedural requirements for the deprivation of nationality, such as providing adequate notification, in wartime. The Commission nonetheless found that in some cases the deprivation of nationality was unlawful because of the absence of the necessary procedural guarantees, such as the possibility of review, which could not be justified even by the exigencies of the war.

925. The Commission applied the substantive and procedural requirements for the deprivation of nationality in the exceptional circumstances of wartime in relation to different categories of individuals as follows:

> "39. *The 1993 Referendum and its Legal Consequences.* Key issues in this claim are rooted in the emergence of the new State of Eritrea, particularly the April 1993 Referendum on Eritrean independence. In brief, Eritrea claimed that, after the war began, Ethiopia wrongly deprived thousands of Ethiopian citizens of Eritrean origin of their Ethiopian citizenship and expelled them, all contrary to international law. Ethiopia responded that the expellees had voluntarily acquired Eritrean nationality, most by qualifying to participate in the 1993 Referendum, and in doing so had foregone their Ethiopian nationality under Ethiopian law. Ethiopia further maintained that all those expelled had also committed other acts justifying viewing them as threats to Ethiopia's security. […]
>
> "57. Neither international humanitarian law nor any treaty applicable between the Parties during the war addresses the loss of nationality or the situation of dual nationals in wartime. With respect to customary international law, Ethiopia contended that customary international law gives a State discretion to deprive its nationals of its nationality if they acquire a second nationality. For its part, Eritrea emphasized everyone's right to a nationality, as expressed in Article 15 of the Universal Declaration of Human Rights, particularly the right not to be arbitrarily deprived of one's nationality. Eritrea maintained that those expelled had not acquired Eritrean nationality, and so were unlawfully rendered stateless by Ethiopia's actions.
>
> "58. The Commission agrees with both Parties regarding the relevance of the customary law rules they cited. The problem remains, however, to apply them in the circumstances here. The question before the Commission is whether Ethiopia's actions were unlawful in the unusual circumstances of the creation of the new State of Eritrea followed by the outbreak of war between Eritrea and Ethiopia. […]

"60. With respect to Eritrea's contention, the Commission also recognizes that international law limits States' power to deprive persons of their nationality. In this regard, the Commission attaches particular importance to the principle expressed in Article 15, paragraph 2, of the Universal Declaration of Human Rights, that 'no one shall be arbitrarily deprived of his nationality.' In assessing whether deprivation of nationality was arbitrary, the Commission considered several factors, including whether the action had a basis in law; whether it resulted in persons being rendered stateless; and whether there were legitimate reasons for it to be taken given the totality of the circumstances.

"61. As to the legal basis of Ethiopia's action, there was no proclamation or similar document in the record recording the decision to terminate the affected persons' Ethiopian nationality, but counsel indicated that this was done pursuant to Ethiopia's 1930 nationality law, a law of long standing comparable to laws of many other countries, which provides that Ethiopian nationality is lost when an Ethiopian acquires another nationality. Neither Party has pointed to any other Ethiopian law that could have been a basis for the termination by Ethiopia of the nationality of any Ethiopians. Consequently, the Commission accepts that all terminations of Ethiopian nationality for which Eritrea is claiming were made on the basis of that law.

"62. If Ethiopia's nationality law were properly implemented in accordance with its terms, only dual nationals could be affected, and that law, by itself, could not result in making any person stateless. Given the fact, however, that Ethiopia did not implement that law until sometime in 1998 with respect to its nationals who had acquired Eritrean nationality between 1993 and 1998, the possibility could not be excluded that some persons who had acquired Eritrean nationality had subsequently lost it and thus were made stateless by Ethiopia's action. Perhaps more likely, statelessness would result if Ethiopia erroneously determined that one of its nationals had acquired Eritrean nationality when, in fact, he or she had not done so. Such an unfortunate result might be most likely to occur with respect to Ethiopian nationals not resident in Ethiopia, but it could occur even with respect to Ethiopians resident in Ethiopia. The evidence indicates that Ethiopia appears to have made at least a few errors in this process. While Eritrea cannot claim for the loss suffered by the persons who were the victims of those errors, Ethiopia is liable to Eritrea for any damages caused to it by those errors.

"63. It remains for the Commission to consider the grounds for Ethiopia's actions as they affected dual nationals in light of the factual circumstances of the emergence of the new State of Eritrea and of the armed conflict between the two. Ethiopia contended that it cannot be arbitrary and unlawful in time of war for it to have terminated the Ethiopian nationality of anyone who, within the past five years, had chosen to obtain the nationality of the enemy State. Eritrea contended that those deprived of their Ethiopian nationality had not been shown to threaten Ethiopia's security, and that it was arbitrary for Ethiopia, which had encouraged people to participate in the Referendum without notice of the potential impact on their Ethiopian nationality, to deprive them of Ethiopian nationality for doing so.

"64. The Commission will examine separately Eritrea's claims regarding several groups deprived of their Ethiopian nationality. [...]

[Dual Nationals Deprived of their Ethiopian Nationality and Expelled for Security Reasons.]

"71. Deprivation of nationality is a serious matter with important and lasting consequences for those affected. In principle, it should follow procedures in which affected persons are adequately informed regarding the proceedings, can present their cases to an objective decision maker, and can seek objective outside review. Ethiopia's process often fell short of this. The process was hurried. Detainees received no written notification, and some claimed they were never told what was happening. Ethiopia contended that detainees could orally apply to security officials seeking release. The record includes some declarations of persons who were released, but it also includes senior Ethiopian witnesses' statements suggesting that there were few appeals. Some declarants claim that they were deprived of Ethiopian nationality and expelled even though they did not qualify to vote in the Referendum or meet Ethiopia's other selection criteria.

"72. Notwithstanding the limitations of the process, the record also shows that Ethiopia faced an exceptional situation. It was at war with Eritrea. Thousands of Ethiopians with personal and ethnic ties to Eritrea had taken steps to acquire Eritrean nationality. Some of these participated in groups that supported the Eritrean Government and often acted on its behalf. In response, Ethiopia devised and implemented a system applying reasonable criteria to identify individual dual nationals thought to pose threats to its wartime security. Given the exceptional wartime circumstances, the Commission finds that the loss of Ethiopian nationality after being identified through this process was not arbitrary and contrary to international law. Eritrea's claims in this regard are rejected.

"73. *Dual Nationals Who Chose to Leave Ethiopia and Go to Eritrea.* There were many dual nationals who decided to leave Ethiopia during the war and go to Eritrea. The total number is uncertain. Ethiopia counted 21,905 family members who accompanied those who were expelled for security reasons. Others left by aircraft or other means. While many, but not all, of these were relatives of those who were expelled for security reasons, the Commission recognizes that, whatever their individual motives may have been, it was a serious act that could not be without consequences for any dual national of two hostile belligerents to choose to leave one for the other while they were at war with each other. The Commission decides that the termination of the Ethiopian nationality of these persons was not arbitrary and was not in violation of international law.

"74. *Dual Nationals Remaining in Ethiopia: 'Yellow-Card People.'* It is undisputed that a considerable number of other dual nationals remained in Ethiopia during the war, that Ethiopia deprived them of their Ethiopian nationality and, in August 1999, required them to present themselves and register as aliens and obtain a residence permit. The August 1999 call for registration ordered that 'any Eritrean of eighteen years of age and over, who has acquired Eritrean nationality taking part in the Eritrean independence referendum or thereafter' must report and be registered. Those who did not comply 'will be considered an illegal person who has unlawfully entered the country and shall be treated as such according to the law.'

"75. Those who registered received distinctive yellow alien identity cards, and were referred to at the hearing as 'yellow-card people'. The numbers affected were disputed. ... Whatever the numbers affected, there was no evidence indicating that the dual nationals in this group threatened Ethiopian security or suggesting other reasons for taking away their Ethiopian nationality. There was no process to identify individuals warranting special consideration and no apparent possibility of review or appeal. Considering that rights to such benefits as land ownership and business licenses, as well as passports and other travel documents were at stake, the Commission finds that this wide-scale deprivation of Ethiopian nationality of persons remaining in Ethiopia was, under the circumstances, arbitrary and contrary to international law.

"76. *Dual Nationals Who Were in Third Countries or Who Left Ethiopia To Go to Third Countries*. Eritrea also contended that an undetermined number of the persons found by the Commission to have been dual nationals were present in other countries when Ethiopia determined that they would no longer be accepted as Ethiopian nationals. As with the 'yellow-card people,' there is no evidence indicating that these people, by their mere presence in third countries could reasonably be presumed to be security threats or that they were found to be potential threats through any individualized assessment process. Moreover, the only means by which they could contest their treatment was to approach Ethiopian diplomatic or consular establishments abroad, and the evidence showed that those who did so to seek clarification or assistance were sent away. The Commission finds that the members of this group were also arbitrarily deprived of their Ethiopian citizenship in violation of international law.

"77. *Dual Nationals Who Were in Eritrea*. The record does not indicate how many dual nationals were in Eritrea when the war began in May 1998 and soon thereafter, when Ethiopia terminated the Ethiopian nationality of Eritrea-Ethiopia dual nationals, but the Commission must assume that some were there. While it could not fairly be assumed that mere presence in Eritrea was proof that such dual-nationals were security risks, the Commission finds that the evident risks and the inability to contact them under wartime conditions made such termination not arbitrary or otherwise unlawful.

"78. *Dual Nationals Expelled for Other Reasons*. While Ethiopia asserted that no one was expelled except for holders of Eritrean nationality found to be security risks through the process previously described, the evidence shows that an unknown, but considerable, number of dual nationals were expelled without having been subject to this process. Particularly in smaller towns and in agricultural areas near the border, most or all dual nationals were sometimes rounded up by local authorities and forced into Eritrea for reasons that cannot be established. There is also evidence to suggest that these expulsions included some dual national relatives of persons who had been expelled as security risks and may have included some dual nationals who were expelled against their will. The Commission holds that the termination of the Ethiopian nationality of all such persons was arbitrary and unlawful."[1937]

[1937] Ibid., paras. 39, 57-58, 60-64 and 71-78 (citations omitted).

926. The award of the Eritrea-Ethiopia Claims Commission found that Ethiopia was liable to Eritrea for "the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible":

> "1. For erroneously depriving at least some Ethiopians who were not dual nationals of their Ethiopian nationality;
>
> "2. For arbitrarily depriving dual nationals who remained in Ethiopia during the war of their Ethiopian nationality;
>
> "3. For arbitrarily depriving dual nationals who were present in third countries during the war of their Ethiopian nationality;
>
> "4. For arbitrarily depriving dual nationals who were expelled to Eritrea but who were not screened pursuant to Ethiopia's security review procedure of their Ethiopian nationality; […]
>
> "6. For permitting the forcible expulsion to Eritrea of some members of expellees' families who did not hold Eritrean nationality …"[1938]

2. Grounds and other considerations relating to the expulsion decision

(a) Grounds

927. A State may expel enemy aliens in time of war without further consideration of the grounds that would normally be required for the expulsion of aliens in time of peace.[1939] The existence of war constitutes a sufficient ground for the expulsion of enemy aliens.[1940] The other grounds may be

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[1938] Ibid., pp. 37-38.

[1939] "The reasons for which aliens may be expelled in time of war differ from those justifiable in time of peace. In time of war a belligerent state is, it is believed, entitled to expel all enemy aliens within its territory. In time of peace, on the other hand, aliens may be expelled only in the interests of public order or welfare or for reasons of state security, internal or external." Shigeru Oda, "Legal Status of Aliens", *in* Max Sørensen (dir.) *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, p. 482 (citing *Boffolo Ctm* (Italy-Yugoslavia), 10 *RIAA*, 528). "In addition to the economic and social grounds of undesirability, political reasons, especially war, have often been the basis of expulsion orders." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 52.

[1940] "No other reason than the existence of the war need be given." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 61 (citing *De Rijon* (Mexico) *v.* U. S., July 4, 1868, Moore's Arb. 3348). "The exigencies of war may justify the action of a belligerent in expelling from its territory aliens whose presence there might not, under normal circumstances, be regarded as dangerous to the safety of the State or gravely detrimental to its welfare. The bare fact of war suffices to excuse the expulsion of aliens who are nationals of the enemy should the territorial sovereign deem it expedient to take such a step. The United States has availed itself of such a right, which it has also necessarily acknowledged to be possessed by other belligerents." Charles Cheney Hyde, relevant for considering the expulsion of aliens who are not nationals of opposing States in the armed conflict and would therefore not qualify as "enemy aliens".

928. In the *Lacoste Case*, the Arbitral Tribunal recognized the "great and extraordinary powers" of a State to expel enemy aliens in time of armed conflict.

> "Lacoste further claims damages for his arrest, imprisonment, harsh and cruel treatment, and expulsion from the country. […] With regard to the expulsion of the claimant from the country, it must be remembered that, owing to the French invasion, the President of Mexico was invested with great and extraordinary powers; and although such powers ought not generally to be exercised for the expulsion of foreigners without good cause shown, the case is different where the foreigner is a countryman by birth of the invaders and conceals, as the claimant appears to have done, the fact that he had adopted the United States as his country."[1941]

(b) Human rights considerations

929. As noted previously, the International Court of Justice has recognized that "[T]he protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights".[1942]

930. The Eritrea-Ethiopia Claims Commission considered the human rights standards applicable in time of armed conflict. The Commission concluded that article 75 of Additional Protocol I provided a minimum standard of human rights for all persons as a matter of customary international law. This minimum standard would apply to enemy aliens who are subject to expulsion and who do not benefit from more favorable treatment under international humanitarian law.

> "30. The Commission views Article 75 of Protocol I as reflecting particularly important customary principles. Article 75 articulates fundamental guarantees applicable to all 'persons who are in the power of a Party to the conflict who do not benefit from more favorable treatment under the Conventions or under this Protocol.' It thus applies even to a Party's treatment of its own nationals. These guarantees distil basic human rights most important in wartime. Given their fundamental humanitarian nature and their correspondence with generally accepted human rights principles, the Commission views these rules as part of customary international humanitarian law.

International Law, Chiefly as Interpreted and Applied by the United States, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 235 (citations omitted).

[1941] *Lacoste v. Mexico* (Mexican Commission), Award of 4 September 1875, in John Bassett Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party, vol. IV, at pp. 3347-3348.

[1942] *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory* (Advisory Opinion), I.C.J. Rep. 2004, at advisory opinion p. 41 (para. 106). *See* Part III.D. as well as Part VII.B.7.

> "31. Article 75 of Protocol I 'acts as a legal "safety net" guaranteeing a minimum standard of human rights for all persons who do not have protection on other grounds.' It confirms their right to be 'treated humanely in all circumstances … without any adverse distinction based upon … national … origin ... or on any other similar criteria.' The Article further affirms important procedural rights of persons subjected to arrest, detainment or internment. They must be promptly informed why these measures have been taken; they must then be released 'with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.'"[1943]

931. Not all of the provisions contained in article 75 would be relevant to the expulsion of enemy aliens (e.g., paragraphs 4 and 7 relating to criminal prosecutions). However, the provisions of article 75 relating to humane treatment, non-discrimination, arrest and conditions of detention may be relevant. In this regard, article 75 provides as follows:

> "1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
>
> "2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
>
> "(a) Violence to the life, health, or physical or mental well-being of persons, in particular: (i) Murder; (ii) Torture of all kinds, whether physical or mental; (iii) Corporal punishment; and (iv) Mutilation;
>
> "(b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
>
> "(c) The taking of hostages;
>
> "(d) Collective punishments; and
>
> "(e) Threats to commit any of the foregoing acts.
>
> "3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures

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[1943] *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 30-31 (para. 31, first sentence: quoting The Handbook of Humanitarian Law in Armed Conflicts, p. 281 (Dieter Fleck (ed.), 1995)).

have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist. […]

> "5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.
>
> "6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict. […]
>
> "8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1."[1944]

(i) Rights of the family

932. The Eritrea-Ethiopia Claims Commission addressed the rights of the family, including the rights of the child, with respect to the expulsion of enemy aliens in time of armed conflict. The Commission noted that international humanitarian law and human rights law provide protection for family and children. However, the Commission further noted with regret that such protection is not absolute in wartime. The Commission concluded that the cases involving the separation of families and children from their parents did not violate international law because of insufficient proof of *a pattern of frequent instances* of forcible family separation or inadequate protection of children *in connection with the detention and expulsion processes*. The Commission stated as follows:

> "154. International humanitarian law imposes clear burdens on belligerents with respect to the protection of children and the integrity of families. Article 27 of Geneva Convention IV, for example, provides that all protected persons are entitled in all circumstances to respect for their family rights. However, both international humanitarian law and human rights law, which Eritrea emphasized, also recognize that, regrettably, absolute protection of the family cannot be assured in wartime. While Article 9 of the Convention on the Rights of the Child states that children should not be separated from their parents against their will, it also recognizes separation may result in the course of armed conflict due to detention or deportation of one or both parents. In the face of the realities of war, Article 24 of Geneva Convention IV sets out special protections for children under the age of fifteen who are separated from their families or orphaned:

[1944] Additional Protocol I, note 192 above, article 75 – Fundamental Guarantees.

"'The parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances.'

"Further guidance appears in Article 38 of the Convention on the Rights of the Child, which calls for parties to take 'all feasible measures to ensure protection and care of children who are affected by an armed conflict'. [...]

"157. The Commission has been concerned with issues of family protection throughout these proceedings, and sought at the hearing to clarify the Parties' positions and the nature and quality of the evidence. Having reviewed the entire record, the Commission is satisfied that Eritrea failed to prove a pattern of frequent instances of forcible family separation or failures to assure the protection of children in connection with Ethiopia's detention and expulsion processes. The record is not devoid of troubling instances of forcible separation of young children from their parents and of entire families separated from the bread-winning parent. Without sanctioning the instances just mentioned, the Commission dismisses Eritrea's family separation claims for failure of proof."[1945]

(ii) Property rights

933. In its partial award on Eritrea's civilian claims, the Eritrea-Ethiopia Claims Commission addressed the property rights of enemy aliens in wartime. The Commission noted that the parties were in agreement with respect to the continuing application of peacetime rules barring expropriation. The Commission, however, emphasized the relevance of *jus in bello* concerning the treatment of enemy property in wartime. The Commission reviewed the evolution of this area of law since the late eighteenth century. The Commission recognized that belligerents have broad powers to deal with the property of enemy aliens in wartime. However, the Commission further recognized that these powers are not unlimited. The Commission found that a belligerent has a duty as far as possible to ensure that the property of enemy aliens is not despoiled or wasted. The Commission also found that freezing or other impairment of private property of enemy aliens in wartime must be done by the State under conditions providing for its protection and its eventual return to the owners or disposition by post-war agreement.

934. The Commission noted that the claims related not to the treatment of enemy property in general, but rather to the treatment of the property of enemy aliens who were subject to expulsion. The Commission therefore considered specific measures taken with respect to the property of enemy aliens who were subject to expulsion as well as the cumulative effect of such measures. The Commission considered the substance of the measures to determine whether they were reasonable or arbitrary or discriminatory. The Commission also considered whether the procedures relating to such

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[1945] *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 154 and 157 (citation omitted).

measures met the minimum standards of fair and reasonable treatment necessary in the special circumstances of wartime.

935. In particular, the Commission considered the lawfulness of (1) the powers of attorney system established for the preservation of property; (2) the compulsory sale of immovable property; (3) taxation measures; (4) the foreclosure of loans; and (5) the cumulative effect of the various measures relating to the property of expelled enemy aliens as follows:

> "124. Both Parties' arguments emphasized the customary international law rules limiting States' rights to take aliens' property in peacetime; both agreed that peacetime rules barring expropriation continued to apply. However, the events at issue largely occurred during an international armed conflict. Thus, it is also necessary to address the role of the jus *in bello,* which gives belligerents substantial latitude to place freezes or other discriminatory controls on the property of nationals of the enemy State or otherwise to act in ways contrary to international law in time of peace. For example, under the *jus in bello,* the deliberate destruction of aliens' property in combat operations may be perfectly legal, while similar conduct in peacetime would result in State responsibility.
>
> "125. The status of the property of nationals of an enemy belligerent under the jus *in bello* has evolved. Until the nineteenth century, no distinction was drawn between the private and public property of the enemy, and both were subject to expropriation by a belligerent. However, attitudes changed; as early as 1794, the Jay Treaty bound the United States and the United Kingdom not to confiscate the other's nationals' property even in wartime. This attitude came to prevail; the 1907 Hague Regulations reflect a determination to have war affect private citizens and their property as little as possible.
>
> "126. The modern *jus in bello* thus contains important protections of aliens' property, beginning with the fundamental rules of discrimination and proportionality in combat operations, which protect both lives and property. Article 23, paragraph (g), of the Hague Regulations similarly forbids destruction or seizure of the enemy's property unless 'imperatively demanded by the necessities of war.' Article 33 of Geneva Convention IV prohibits pillage and reprisals against protected persons' property, both in occupied territory and in the Parties' territory. Article 38 of Geneva Convention IV is also relevant. It establishes that, except for measures of internment and assigned residence or other exceptional measures authorized by Article 27, 'the situation of protected persons shall continue to be regulated, in principle, by the provisions governing aliens in time of peace.'
>
> "127. However, these safeguards operate in the context of another broad and sometimes competing body of belligerent rights to freeze or otherwise control or restrict the resources of enemy nationals so as to deny them to the enemy State. Throughout the twentieth century, important States including France, Germany, the United Kingdom, and the United States have frozen 'enemy' property, including property of civilians, sometimes vesting it for the vesting State's benefit. As Rousseau summarizes:

'During the war of 1914, nearly all the warring States ... took very severe restrictive measures, ranging from simple sequestration (France) to the liquidation and sale of the goods of the enemy subjects (Great Britain, Germany) ... [During the war of 1939]: A regime similar to that of 1914 — built around the three notions of control, sequestration and liquidation — was applied by all of the belligerents.' [French original.]

Such control measures have been judged necessary to deny the enemy access to economic resources otherwise potentially available to support its conduct of the war.

"128. States have not consistently frozen and vested enemy private property. In practice, States vesting the assets of enemy nationals have done so under controlled conditions, and for reasons directly tied to higher state interests; commentators emphasize these limitations. The post-war disposition of controlled property has often been the subject of agreements between the former belligerents. These authorize the use of controlled or vested assets for post-war reparations or claims settlements, thereby maintaining at least the appearance of consent for the taking. This occurred both in the Versailles Treaty after World War I and in peace treaties after World War II.

"129. Eritrea did not contend that Ethiopia directly froze or expropriated expellees' property. Instead, it claimed that Ethiopia designed and carried out a body of interconnected discriminatory measures to transfer the property of expelled Eritreans to Ethiopian hands. These included:

"- Preventing expellees from taking effective steps to preserve their property;

"- Forcing sales of immovable property;

"- Auctioning of expellees' property to pay overdue taxes; and

"- Auctioning of expellees' mortgaged assets to recover loan arrears.

Eritrea asserts that the cumulative effect of these measures was to open up Eritrean private wealth for legalized looting by Ethiopians. [...]

[Preservation of Property - Powers of Attorney]

"133. The Commission recognizes the enormous stresses and difficulties besetting those facing expulsion. There surely were property losses related to imperfectly executed or poorly administered powers of attorney. However, particularly in these wartime circumstances, where the evidence shows Ethiopian efforts to create special procedures to facilitate powers of attorney by detainees, the shortcomings of the system of powers of attorney standing alone do not establish liability. [...]

[Compulsory Sale of Immovable Property]

"135. Prohibiting real property ownership by aliens is not barred by general international law; many countries have such laws. The Commission accepts that dual nationals deprived of their Ethiopian nationality and expelled pursuant to Ethiopia's security screening process could properly be regarded as Eritreans for purposes of applying this legislation. Further, Ethiopia is not internationally responsible for losses resulting from sale prices depressed because of general economic circumstances related to the war or other similar factors.

"136. Nevertheless, the Commission has serious reservations regarding the manner in which the prohibition on alien ownership was implemented. The evidence showed that the Ethiopian Government shortened the period for mandatory sale of deportees' assets from the six months available to other aliens to a single month. This was not sufficient to allow an orderly and beneficial sale, particularly for valuable or unusual properties. Although requiring Eritrean nationals to divest themselves of real property was not contrary to international law, Ethiopia acted arbitrarily, discriminatorily, and in breach of international law in drastically limiting the period available for sale. [...]

[The Location Value Tax]

"140. The Commission concludes that the 100% 'location tax' was not a tax generally imposed, but was instead imposed only on certain forced sales of expellees' property. Such a discriminatory and confiscatory taxation measure was contrary to international law. [...]

[Foreclosures of Expellees' Loans]

"142. It does not appear that performing loans were accelerated. Instead, loans in default were collected in accordance with their terms and with legislation in force when the war began. While some or all of the other measures discussed in this section may have contributed to expellees' inability to keep their loans current, the record does not show that the measures to collect overdue loans were in themselves contrary to international law. This claim must be dismissed. [...]

[Tax Collection]

"144. International law did not prohibit Ethiopia from requiring that expellees settle their tax liabilities, but it required that this be done in a reasonable and principled way. The evidence indicates that it was not. The amount demanded was simply an estimate. There was no effective means for most expellees to review or contest this amount. There was very little time between issuance of the tax notice and deportation (if indeed the notice was issued before the taxpayer was expelled). There was no assurance that expellees or their agents received the notices. If they did, the payment of taxes could be impossible because of bank foreclosure proceedings against assets and the array of other economic misfortunes befalling expellees. Viewed overall, the tax collection process was approximate and arbitrary and failed to meet the minimum standards of fair and reasonable treatment necessary in the circumstances.

"145. *Restricted Accounts*. The evidence suggested that any proceeds remaining to expellees after forced property sales and collection of outstanding loans and taxes could be deposited into an account opened by the Ethiopian authorities in the former owner's name in the Commercial Bank of Ethiopia. These accounts required the owner to come in person with the passbook to access the funds. Eritrea contended that expellees could not access these accounts, either because they did not possess the passbook or could not come in person.

"146. There was evidence suggesting that a few account holders or persons authorized to act on their behalf were able to access such accounts. Particularly in light of the rights of belligerents to freeze the assets of persons present in any enemy State and to block transfers of funds there, it was not illegal for Ethiopia to establish these accounts in a way that effectively foreclosed fund transfers abroad. Eritrea's claims with respect to these bank accounts are denied. [...]

"151. *The Cumulative Weight of Ethiopia's Measures*. In addition to its findings above regarding particular Ethiopian economic measures, the Commission believes that the measures' collective impact must be considered. War gives belligerents broad powers to deal with the property of the nationals of their enemies, but these are not unlimited. In the Commission's view, a belligerent is bound to ensure insofar as possible that the property of protected persons and of other enemy nationals are not despoiled and wasted. If private property of enemy nationals is to be frozen or otherwise impaired in wartime, it must be done by the State, and under conditions providing for the property's protection and its eventual disposition by return to the owners or through post-war agreement.

"152. The record shows that Ethiopia did not meet these responsibilities. As a result of the cumulative effects of the measures discussed above, many expellees, including some with substantial assets, lost virtually everything they had in Ethiopia. Some of Ethiopia's measures were lawful and others were not. However, their cumulative effect was to ensure that few expellees retained any of their property. Expellees had to act through agents (if a reliable agent could be found and instructed), faced rapid forced real estate sales, confiscatory taxes on sale proceeds, vigorous loan collections, expedited and arbitrary collection of other taxes, and other economic woes resulting from measures in which the Government of Ethiopia played a significant role. By creating or facilitating this network of measures, Ethiopia failed in its duty to ensure the protection of aliens' assets."[1946]

936. The award of the Eritrea-Ethiopia Claims Commission found that Ethiopia was liable to Eritrea for "the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible: [...]

[1946] Ibid., paras. 124-129, 133, 135-136, 140, 142, 144-146, 151-152 (para. 127: quoting Ch. Rousseau, *droit international public*, pp. 346-347 (September, 1973)) (other citations omitted).

> "11. For limiting to one month the period available for the compulsory sale of Eritrean expellees' real property;
>
> "12. For the discriminatory imposition of a 100% 'location tax' on proceeds from some forced sales of Eritrean expellees' real estate;
>
> "13. For maintaining a system for collecting taxes from Eritrean expellees that did not meet the required minimum standards of fair and reasonable treatment; and
>
> "14. For creating and facilitating a cumulative network of economic measures, some lawful and others not, that collectively resulted in the loss of all or most of the assets in Ethiopia of Eritrean expellees, contrary to Ethiopia's duty to ensure the protection of aliens' assets."[1947]

937. Similarly, in its partial award on Ethiopia's civilian claims, the Eritrea-Ethiopia Claims Commission found that the expulsion of enemy aliens did not provide adequate protection for their property rights as a result of Eritrean officials' wrongful seizures of their property and wrongful interference with their efforts to protect their property. The Commission stated as follows:

> "132. *Claims for Property Losses*. Article 35 of Geneva Convention IV requires that departees be allowed to take funds required for their journey and 'a reasonable amount of their effects and articles of personal use.' Article 33 of Geneva Convention IV prohibits reprisals against the property of protected persons, and Article 23, paragraph (g), of the Hague Regulations forbids seizure of enemy property unless demanded by military necessity. These safeguards, of course, operate in the context of another broad and sometimes competing body of belligerent rights to deny the resources of enemy nationals to the enemy State.
>
> "133. The evidence showed that those Ethiopians expelled directly from Eritrean detention camps, jails and prisons after May 2000 did not receive any opportunity to collect portable personal property or otherwise arrange their affairs before being expelled. Accordingly, Eitrea is liable for those economic losses (suffered by Ethiopians directly expelled from detention camps, jails and prisons) that resulted from their lack of opportunity to take care of their property or arrange their affairs before being expelled.
>
> "134. The record also contained many complaints from other departing Ethiopians about the short time they were allowed to arrange their affairs, and even troubling instances of interference by Eritrean officials in their efforts to secure or dispose of property (addressed below). On balance, the record supports the conclusion that, under the necessarily disruptive circumstances, the departing Ethiopians who were not expelled had reasonable opportunity to arrange their affairs as best they could prior to departure. Claims for economic losses based solely on short notice for departure are dismissed.

[1947] Ibid., Award, p. 38.

> "135. The Commission, however, was struck by the cumulative evidence of the destitution of Ethiopians arriving from Eritrea, whether expelled directly from detention post-May 2000 or otherwise. Although this may be partially explained by the comparatively low-paying jobs held by many in the original Ethiopian community, the Commission finds it also reflected the frequent instances in which Eritrean officials wrongfully deprived departing Ethiopians of their property. The record contains many accounts of forcible evictions from homes that were thereafter sealed or looted, blocked bank accounts, forced closure of businesses followed by confiscation, and outright seizure of personal property by the police. The Commission finds Eritrea liable for economic losses suffered by Ethiopian departees that resulted from Eritrean officials' wrongful seizure of their property and wrongful interference with their efforts to secure or dispose of their property."[1948]

938. In the award, the Eritrea-Ethiopia Claims Commission found that Eritrea was liable "for the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible: [...]

> "12. For allowing the seizure of property belonging to Ethiopians departing other than from detention camps, prisons and jails, and otherwise interfering with the efforts of such Ethiopians to secure or dispose of their property."[1949]

3. Procedural requirements

939. In 1892, the Institut de Droit international recognized that the same procedural guarantees may not apply to the expulsion of aliens in wartime, namely the right of appeal. According to the Institut, "[a]liens who, in times of war or when war is imminent, imperil the security of the State by their conduct"[1950] shall not be granted appeal in the event of their expulsion.[1951]

[1948] *Partial Award, Civilians Claims, Ethiopia's Claim 5*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 132-135 (citing Hague Convention (IV) Respecting the Laws and Customs of War on Land and Annexed Regulations, Oct. 18, 1907, 36 Stat. p. 2277, 1 Bevans p. 631).

[1949] Ibid., para. 12.

[1950] *Règles internationales*, note 56 above, article 28, para. 10.

[1951] Ibid., article 36. See also *Ex Parte Zenzo Arakawa: Zenzo Arakawa v. Clark*, United States, District Court for the Eastern District of Pennsylvania, 4 June 1947, *Annual Digest and Reports of Public International Law Cases*, 1948, H. Lauterpacht (ed.), Case No. 164, pp. 508-512 ("An alien enemy, in time of war, has only those rights which are not taken away from him by the President of the United States acting within the authority conferred upon him by law. Therefore, when a relator, hostile or otherwise, has been detained and ordered removed from this country pursuant to executive orders, this court is without power to review the orders or the means by or the manner in which he was detained and ordered removed except with respect to the question whether the relator is other than an alien enemy."); *United States ex rel. Schlueter v. Watkins*, United States, Southern District of New York, 67 F.Supp. 556, 6 August 1946, *Annual Digest and Reports of Public International Law Cases*, 1946, H. Lauterpacht (ed.), Case No. 100, pp. 233-234 (aff'd by 2nd Cir., 158 F.2d 853, 31 December 1946, ("The foregoing premises lead to the conclusion that the courts are without power to review the action of the executive in ordering removal of an

4. Departure

(a) Voluntary departure

940. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War recognizes the right of aliens who are protected persons to leave the territory of a party to the conflict. Article 35 states as follows:

> "All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use.
>
> "If any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.
>
> "Upon request, representatives of the Protecting Power shall, unless reasons of security prevent it, or the persons concerned object, be furnished with the reasons for refusal of any request for permission to leave the territory and be given, as expeditiously as possible, the names of all persons who have been denied permission to leave."[1952]

(b) Deportation

(i) Humane treatment

941. The requirements of humane treatment would seem to apply to the expulsion of enemy aliens in time of armed conflict.[1953] The Eritrea-Ethiopia Claims Commission held that the expulsion of

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alien enemy in time of war, except with respect to the question whether the relator is an enemy alien."); *Rex v. Bottrill; Ex Parte Kuechenmeister*, Court of Appeal of England, 19, 22, 23 and 30 July 1946, *Annual Digest and Reports of Public International Law Cases*, 1946, H. Lauterpacht (ed.), Case No. 132, pp. 312-321. ("[H]abeas corpus does not lie against the Crown at the instance of an alien enemy interned for the safety of the realm in time of war by an order of the Executive acting within its discretional authority on behalf of the King.")

[1952] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, United Nations, *Treaty Series*, vol. 75, No. 973, p. 287.

[1953] "[The United States] has had occasion, however, to complain of the harsh methods by which other States when engaged in war have had recourse to expulsion." Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 235-236 (citing Mr. Olney, Secy. of State, to Mr. Dupuy de Lome, Spanish Minister, Sept. 27, 1895, For. Rel. 1895, II, 1229, Moore, Dig., IV. 139; also Mr. Hay, Secy. of State, to Mr. Choate, American Ambassador at London, No. 494, Nov. 14, 1900, MS. Inst. Great Britain, XXXIII, 505, Moore, Dig., IV, 141).

enemy aliens by a belligerent State during an international armed conflict must comply with Articles 35 and 36 of Geneva Convention IV.[1954]

942. In the *Lacoste* case, the Arbitral Tribunal recognized the existence of "great and extraordinary powers" of a State to expel enemy aliens in time of armed conflict. At the same time, the Tribunal considered the continuing requirement of humane treatment.

> "The expulsion does not, however, appear to have been accompanied by harsh treatment, and at his request the claimant was allowed an extension of the term fixed for his leaving the country."[1955]

943. In its partial award on Eritrea's civilian claims, the Eritrea-Ethiopia Claims Commission considered the conditions for the departure of enemy aliens expelled by a belligerent State in time of armed conflict under the standards for humane treatment provided by international humanitarian law. In this regard, the Commission considered the Geneva Convention Relative to the Protection of Civilian Persons in Time of War[1956] and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts.[1957] The Commission stated as follows:

> "99. *Physical Conditions of Expulsion*. Eritrea also claimed that the physical conditions under which persons were expelled from Ethiopia were inhumane and unsafe. International humanitarian law requires that all departures, whether lawful or not, be conducted humanely, 'in satisfactory conditions as regards safety, hygiene, sanitation and food.' Eritrea contended that these conditions were not met; Ethiopia contended that they were. The two sides presented extensive and sharply conflicting evidence. [...]
>
> "106. Based on the totality of the record, the Commission concludes that, despite some efforts to provide for expellees during some transports, the physical conditions frequently failed to comply with international law requirements of humane and safe treatment."[1958]

[1954] *Partial Award, Civilians Claims, Ethiopia's Claim 5*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, para. 122: "However, the conditions of all such expulsions must meet minimum humanitarian standards, as set forth in Articles 35 and 36 of Geneva Convention IV."

[1955] Case of Lacoste (Mexican Commission), in John Bassett Moore, History and Digest of the International Arbitrations to which the United States has been Party, vol. IV, Washington, Government Printing Office, 1898, pp. 3347-3348.

[1956] Geneva Convention, note 1952 above. Article 36, paragraph 1, states as follows: "Departures under the foregoing Article shall be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food..." Article 35 concerns the right to leave or voluntary departure.

[1957] Additional Protocol I, note 192 above.

[1958] *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 99 and 106 (quoting Geneva Convention IV, art. 36(1) and also citing Protocol I, article 75).

944. The award of the Eritrea-Ethiopia Claims Commission found that Ethiopia was liable to Eritrea for "the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible":

> "8. For frequently failing to provide humane and safe treatment to persons being expelled to Eritrea from Ethiopia; ..."[1959]

945. In its partial award on Ethiopia's civilian claims, the Eritrea-Ethiopia Claims Commission considered whether the expulsion of enemy aliens complied with the standard of treatment for the departure of such aliens under international humanitarian law. The Commission found that the expulsions that were supervised by ICRC complied with these rules. However, the Commission found that other expulsions that were not subject to such supervision failed to ensure the necessary safe and humane conditions for departure. The Commission stated as follows:

> "128. *Physical Conditions of Repatriation*. Ethiopia contended that expellees were forced to leave Eritrea in harsh and unsafe conditions, citing Article 36 of Geneva Convention IV, which requires that all voluntary departures from the territory of a belligerent 'must be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food.' Eritrea maintained that departure conditions were satisfactory, contending that departures generally were conducted with active ICRC involvement, and were as safe and comfortable as possible in the circumstances.
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> "129. The ICRC publicly reported that it organized the safe return to Ethiopia of 12,000 Ethiopians during 2000. Eritrea presented numerous witness statements describing the ICRC's role in arranging safe transports of Ethiopians, particularly from the immigration detention facility at Adi Abeyto. The record also indicates that Ethiopian prisoners directly expelled to Ethiopia from other Eritrean detention camps were physically transported by the ICRC or under its supervision. The witness accounts of released detainees typically express satisfaction with the ICRC's role in their return to Ethiopia, not complaints.
>
> "130. However, the evidence also showed that the ICRC was not involved in some transports that exposed departing Ethiopians to harsh and hazardous conditions. Eritrea's own witnesses described a case where local authorities transported a group of Ethiopians to the border without coordination or ICRC involvement. The U.S. State Department cited reports of six deportees allegedly drowning while attempting to cross the Mereb River. There were disquieting reports regarding a group of women transported from Assab to Djibouti by sea under harsh and dangerous conditions in mid-July 2000. The ICRC publicly criticized the forcible deportation of 2,700 people from a camp north of Asmara under harsh and dangerous conditions in August 2000.
>
> "131. The evidence indicates that the ICRC played a valuable role in ensuring that thousands of Ethiopians returned home safely, but Eritrea has not explained why the ICRC

[1959] Ibid., Award, p. 38.

played no role in other departures which did not ensure safe and humane repatriations. The Commission finds that Eritrea failed to ensure safe and humane conditions in departures in which the ICRC did not play a role."[1960]

946. In the award, the Eritrea-Ethiopia Claims Commission found that Eritrea was liable "for the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible":

> "11. For failing to ensure the safe and humane repatriation of departing Ethiopians in transports that were not conducted or supervised by the ICRC ..."[1961]

(ii) Reasonable opportunity to protect property and similar interests

947. An enemy alien who is subject to expulsion in time of armed conflict may not be given the same amount of time to take care of his or her property rights or similar interests.

> "Except in times of war or imminent danger to the security of the State, adequate time should be given to the alien against whom an expulsion or deportation order has been made to wind up his or her personal affairs. The alien should be given a reasonable opportunity to dispose of property and assets, and permission to carry or transfer money and other assets to the country of destination; in no circumstances should the alien be subjected to measures of expropriation or be forced to part with property and assets." [1962]

948. In its partial Award on Eritrea's civilian claims, the Eritrea-Ethiopia Claims Commission found Ethiopia liable for the compulsory sale of the immovable property of enemy aliens who were subject to expulsion was contrary to international law because of the limited time period available for the sale.[1963]

949. In its partial award on Ethiopia's civilian claims, the Eritrea-Ethiopia Claims Commission stated that "expellees were entitled to adequate opportunity to protect any property or economic interests they had in Eritrea." The Commission found that Eritrea was liable "for the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible:

[1960] *Partial Award, Civilians Claims, Ethiopia's Claim 5*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 128-131.

[1961] Ibid., Award, para. 12.

[1962] Louis B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington D.C., American Society of International Law, 1992, p. 96.

[1963] *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, para. 136 quoted above.

> "10. For expelling several thousand Ethiopians from Eritrea directly from detention camps, prisons and jails during the summer of 2000 under conditions that did not allow them to protect their property or interests in Eritrea;
>
> 11. For failing to ensure the safe and humane repatriation of departing Ethiopians in transports that were not conducted or supervised by the ICRC …"[1964]

(c) Detention

950. The Eritrea-Ethiopia Claims Commission considered the international standard for the treatment of enemy aliens held in detention prior to deportation during an armed conflict. The Commission indicated that such aliens were entitled to humane treatment under international humanitarian law. The Commission found insufficient evidence of a widespread or significant failure to meet this standard of treatment with respect to the enemy aliens who were held in short-term detention prior to their deportation. The Commission stated as follows:

> "107. *Introduction.* Eritrea's third major claim is that Ethiopia wrongfully detained large numbers of civilians under harsh conditions contrary to international law. This claim involves separate groups, including (a) persons held pending their expulsion, often for brief periods and in temporary facilities … For each group, Eritrea contended both that the initial detentions were illegal and that the detainees were held in poor and abusive conditions that did not satisfy legal requirements.
>
> "108. *Applicable Law.* The applicable law depended upon the status or nationality of those involved. Some were Eritrean nationals protected by international humanitarian law applicable in international armed conflicts. As to Ethiopian nationals, international human rights law provided relevant rules. In cases of uncertainty regarding persons' status, the 'safety net' provisions of Article 75 of Protocol I provided protection. However, all potentially applicable legal rules required humane treatment and provided broadly similar protection.
>
> "109. *Persons Detained Short-Term.* This group primarily involved persons held for short periods pending their expulsion from Ethiopia. Many Eritrean witness accounts describe uncomfortable but short-term detention as groups of expellees were assembled, often in temporary facilities, for transport to the border. There was conflicting evidence regarding the availability of food, water and bedding; conditions may have varied by location and over time. There were few allegations of physical abuse, but allegations of verbal abuse were more common.
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> "110. While the Commission believes that the physical circumstances of persons being held pending deportation were often austere and uncomfortable, the periods involved were

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[1964] *Partial Award, Civilians Claims, Ethiopia's Claim 5*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, Award, para. 12.

generally short, and there were few allegations of physical abuse. The Commission finds that the evidence is insufficient to show a widespread or significant failure by Ethiopia to provide internationally required standards of treatment for persons held in short-term detention prior to their expulsion."[1965]

5. Mass expulsion

951. State practice with respect to the treatment of enemy aliens has ranged from imprisonment as prisoners of war, to permitting voluntary departure to compulsory departure or expulsion.[1966] A State may be entitled to expel all enemy aliens in the context of an armed conflict under international law[1967] even though this may result in the expulsion of a large number of individuals.[1968]

[1965] *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 107-110 (citations omitted).

[1966] "The outbreak of war affects likewise such subjects of the belligerents as are at the time within the enemy's territory. In former times they could all at once be detained as prisoners of war, and many States, therefore, concluded in time of peace special treaties for the time of war expressly stipulating for a period during which their subjects should be allowed to leave each other's territory unmolested. Through the influence of such treaties, which became pretty general during the eighteenth century, it became an international practice that, as a rule, enemy subjects must be allowed a reasonable period within which to withdraw, and no instance of the former rule occurred during the nineteenth century. […] However that may be, a belligerent need not allow enemy subjects to remain on his territory, although this is frequently done." Lassa Francis Lawrence Oppenheim, *International Law: A Treatise* (edited by H. Lauterpacht), vol. II - Disputes, War and Neutrality, 7th ed., London, Longmans, Green and Co. Ltd., 1952, pp. 306-307 (citations omitted).

[1967] "In time of war a belligerent state is, it is believed, entitled to expel all enemy aliens within its territory." Shigeru Oda, "Legal Status of Aliens", *in Max* Sørensen (dir.) *Manual of Public International Law*, New York, St. Martin's Press, 1968, pp. 481-495, at p. 482 (citing *Boffolo Ctm* (Italy-Yugoslavia), 10 *RIAA*, 528). "To enemy nationals found within the national territory at the outbreak of war, a State may apply a great number of measures of self-protection and, in principle, it has the right to expel them all." Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, Grotius Publications Limited, 1987, p. 36 and n. 12 (citing, *inter alia*, "Fran.-Mex. Arbitration (C. 1839), decided by Queen Victoria (1844), 5 *Int.Arb.* p. 4865: "On the wholesale expulsion of Frenchmen from Mexico on the outbreak of hostilities in 1838, the arbitrator was of opinion that no indemnity was due to France, the act 'being justified by the state of hostilities between them' (p. 4866)"). "International law authorizes the state to expel from its territory all or any of the subjects of its enemy." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 61 (citations omitted).

[1968] "While formerly such expulsions *en masse* were common, they have been but rarely resorted to in recent times. Thus, in the Crimean War in 1854, Russia permitted French and British subjects to continue peaceably to reside; Italy similarly extended this privilege to Austrian subjects in the Italian War of Liberation of 1859 and to Turkish subjects in the Turko-Italian war of 1912; China and Japan extended it respectively in the Chino-Japanese War of 1894, as did the United States and Spain respectively in the Spanish-American War of 1898, and Japan again in the Russo-Japanese War of 1904. In the present European War, alien enemies have in general been permitted to remain, under various measures of surveillance. […] On the other hand, France considered it necessary to expel German subjects during the Franco-Prussian War of 1870, Turkey, to expel Greek subjects in the War of 1897 and Italian subjects in the war of 1912, the Boers, to expel British subjects from the Transvaal

952. In its partial award on Eritrea's civilian claims, the Eritrea-Ethiopia Claims Commission affirmed the broad powers of a belligerent to expel enemy aliens who are nationals of the opposing State. The Commission noted that this power can be exercised lawfully only by the belligerent State. The Commission found that Ethiopia was liable for permitting the unlawful expulsion of enemy aliens by the local authorities to occur. The Commission also noted that this power did not extend to family members of such aliens who were nationals of other States. The Commission was unable to determine the extent to which such expulsions occurred due to insufficient evidence. The Commission stated as follows:

> "81. International humanitarian law gives belligerents broad powers to expel nationals of the enemy State from their territory during a conflict. The Commission notes in this regard the following statement of the relevant international law by a leading treatise:
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> > 'The right of states to expel aliens is generally recognized. It matters not whether the alien is on a temporary visit or has settled down for professional, business or other purposes on its territory, having established his domicile there. On the other hand, while a state has a broad discretion in exercising its right to expel an alien, its discretion is not absolute. Thus, by customary international law it must not abuse its right by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion. Beyond this, however, customary international law provides no detailed rules regarding expulsion and everything accordingly depends upon the merits of the individual case. Theory and practice correctly make a distinction between expulsion in time of hostilities and in time of peace. A belligerent may consider it convenient to expel all hostile nationals residing, or temporarily staying, within its territory: although such a measure may be very hard on individual aliens, it is generally accepted that such expulsion is justifiable.'
>
> "82. The Commission concluded above that Ethiopia lawfully deprived a substantial number of dual nationals of their Ethiopian nationality following identification through Ethiopia's security committee process. Ethiopia could lawfully expel these persons as nationals of an enemy belligerent, although it was bound to ensure them the protections required by Geneva Convention IV and other applicable international humanitarian law. Eritrea's claim that this group was unlawfully expelled is rejected. […]

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in 1900, and the Russians, to expel the Japanese from certain provinces in 1904. In the present European War, it seems that Russia has ordered the expulsion of all Turks, and Germans and Austrians have been expelled from French Morocco. A limited time is usually granted for the departure of enemy individuals in the territory and of enemy merchant vessels in the ports of a belligerent. The permission to remain or the order of expulsion, with the accompanying conditions, are usually published in the form of a proclamation […] With the progress of civilization, there is an increasing tendency to confine the effects of an armed conflict within as narrow limits as possible and to mitigate the rigorous maintenance of the principle that subjects of an enemy state may be treated as enemies, in favor of the unarmed civilian alien, whose person and property are respected, with certain variously stated exceptions, as before the war." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, pp. 61-62 (citations omitted).

> "92. The Commission noted above that international law allows a belligerent to expel the nationals of the enemy State during wartime. Thus, to the extent that those expelled were Eritrean nationals, their expulsion was lawful, even if harsh for the individuals affected. […]
>
> "95. The Commission does not regard Ethiopia as having any liability for departures in these situations, where departures resulted from choices made by the affected individuals or their families. As a belligerent can lawfully expel a national of the enemy State, family members' decisions to accompany the expellee, either at the initial expulsion or thereafter, are lawful as well.
>
> "96. However, the evidence also indicates that some family members were forcibly expelled. Many Eritrean declarants speak broadly of their family members being expelled or deported following the declarant's expulsion. It often is not clear whether the words 'expelled' or 'deported' are used in a technical way and whether these departures in fact resulted from compulsion by Ethiopian officials. Nevertheless, some declarations clearly describe direct coercion being used to detain and forcibly expel family members, including wives and young children.
>
> "97. To the extent that family members who did not hold Eritrean nationality were expelled, the expulsion was contrary to international law. Given the limitations of the evidence, the Commission cannot determine the extent to which this occurred. […]
>
> "98. *Other Dual Nationals.* As discussed in paragraph 78 above, in addition to rural residents, the evidence shows that an unknown, but considerable, number of dual nationals, including some relatives of dual nationals previously expelled as security risks, were rounded up by local authorities and forced into Eritrea for reasons that cannot be established. The Commission has held that the termination of their Ethiopian nationality was arbitrary and consequently unlawful and that Ethiopia is liable for permitting it to occur. As the Commission indicated in paragraph 92 above, the right to expel the nationals of the enemy State in wartime is a right of a belligerent, and it can be exercised lawfully only by a belligerent. Ethiopia, the belligerent, did not conduct, authorize, or ratify these expulsions. Consequently, they were unlawful under applicable international law, and Ethiopia is liable for permitting them to occur.[1969]

[1969] *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 81-82, 92, 95-98, para. 81: quoting Robert Jennings and A. Watts, *Oppenheim's International Law,* 9th ed., vol. I – Peace (Parts 2 to 4), 1996, § 413, pp. 940-941; and further citing "Karl Doehring, "Aliens, Admission", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 107-109 ("[A] State may nonetheless be justified in expelling such a group without regard to the individual behaviour of its members, if the security and existence of the expelling State would otherwise be seriously endangered, for example ... during a state of war."); Gerald Draper, The Red Cross Conventions, pp. 36-37 (1958), *quoted in* 10 Digest of International Law p. 274 (Marjorie Whiteman ed., 1968) (citing "the customary right of a state to expel all enemy aliens at the outset of a conflict"); Handbook of Humanitarian Law, *supra* note 15, at § 589(5), p. 287 (forced "repatriation [of nationals of an enemy state] must be considered as permissible"); McNair & Watts, *supra* note 23, at p. 76 ("There is no

953. The Eritrea-Ethiopia Claims Commission found that Ethiopia was liable to Eritrea for "the following violations of international law involving acts or omissions by its civilian officials, military personnel or others for whose conduct it is responsible":

> "7. For permitting local authorities to forcibly to expel to Eritrea an unknown, but considerable, number of dual nationals for reasons that cannot be established …"[1970]

954. In its partial award on Ethiopia's civilian claims, the Eritrea-Ethiopia Claims Commission confirmed the right of a belligerent to expel enemy aliens who are present in its territory under *jus in bello*. The Commission stated as follows:

> "121. In its separate Partial Award on Eritrea's Civilians Claims, the Commission addresses the right of a belligerent under *the jus in bello* to expel the nationals of an enemy State during an international armed conflict. The evidence indicates that a very high proportion of the thousands of Ethiopians who were held in Eritrean detention camps, jails and prisons were expelled by Eritrea directly from their places of detention. The personal consequences of these enforced departures from Eritrea may have been harsh in many cases. Nevertheless, Eritrea acted consistently with its rights as a belligerent in compelling these departures and those of any other Ethiopians who were forced to leave during this period. […]
>
> "123. The evidence does not establish that other Ethiopians who left Eritrea between June and December 2000 were expelled pursuant to actions or policies of the Government of Eritrea. While Eritrea had the right as a belligerent to require nationals of the enemy State to depart, the evidence does not establish that it took such action with respect to persons not held in detention."[1971]

6. National law and jurisprudence

955. National legislation may allow for the expulsion of an enemy alien in times of war.[1972] In this respect, a State may also establish special provisions for the deportation of aliens expelled during a war.[1973]

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rule which requires a belligerent to allow enemy subjects to remain in his territory and he is entitled to expel them if he chooses"). Geneva Convention IV does not explicitly address expulsion of nationals of the enemy state or other aliens, instead emphasizing the right of aliens who wish to leave the territory of a belligerent to do so; *See* article 35.

[1970] *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, Award, p. 38.

[1971] *Partial Award, Civilians Claims, Ethiopia's Claim 5*, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 121 and 123 (citation omitted).

[1972] United States, INA, section 331(d)-(e).

[1973] United States, INA, section 241(b)(2)(F). A wartime deportation can be made to: (1) the government in exile of the alien's State (United States, INA, section 241(b)(2)(F)(i)); (2) a State near the alien's State (United States,

956. The national courts of States have also recognized that enemy aliens who are subject to expulsion in time of armed conflict may not be entitled to the same procedural guarantees.[1974]

INA, section 241(b)(2)(F)(ii)); or (3) a State to which the alien's State consents (United States, INA, section 241(b)(2)(F)(ii)).

[1974] See, e.g., *Ex Parte Zenzo Arakawa: Zenzo Arakawa v. Clark*, District Court for the Eastern District of Pennsylvania, 4 June 1947, *Annual Digest and Reports of Public International Law Cases*, 1948, H. Lauterpacht (ed.), Case No. 164, pp. 508-512: "An alien enemy, in time of war, has only those rights which are not taken away from him by the President of the United States acting within the authority conferred upon him by law. Therefore, when a relator, hostile or otherwise, has been detained and ordered removed from this country pursuant to executive orders, this court is without power to review the orders or the means by or the manner in which he was detained and ordered removed except with respect to the question whether the relator is other than an alien enemy." (quoted from (1948) Annual Digest and Reports of Public International Law Cases, p. 508, at p. 511); *Rex v. Bottrill; Ex Parte Kuechenmeister*, Court of Appeal of England, 19, 22, 23 and 30 July 1946, *Annual Digest and Reports of Public International Law Cases*, 1946, H. Lauterpacht (ed.), Case No. 132, pp. 312-321. In *Ludeck* v. *Watkins*, the United States Supreme Court held that the removal of an enemy alien was not subject to judicial review (335 U.S. 160 (1948)), [per Goodwin Gill.]

XI. REMEDIES FOR THE UNLAWFUL EXPULSION OF ALIENS

957. State responsibility results from the expulsion of an alien which is contrary to international law. The Commission has completed its project on State responsibility for internationally wrongful acts are contained in the articles adopted by the International Law Commission in 2001 and annexed to General Assembly resolution 56/83 of 12 December 2001.[1975] These articles provide the rules for the determination of the legal consequences of an internationally wrongful act,[1976] including an unlawful expulsion. The present study therefore does not discuss in detail the legal consequences of an unlawful expulsion. However, it may be useful to consider the *forms of reparation* for an unlawful expulsion which have been awarded by arbitral tribunals and judicial organs as well as the question of the burden of proof with respect to the unlawful character of an expulsion.

958. The unlawful character of an expulsion may result from the violation of (1) a rule contained in an international treaty to which the expelling State is a party; (2) a rule of customary international law; or (3) a general principle of law.[1977] A State may incur international responsibility in the following situations: (1) the expulsion is unlawful as such; (2) the applicable procedural requirements have not been respected; or (3) the expulsion has been enforced in an unlawful manner.

959. Attention may be drawn in this respect to a draft article dealing specifically with the international responsibility of a State in relation to the unlawful expulsion of an alien under municipal law, which was proposed to the International Law Commission by the Special Rapporteur, F. V. García Amador. The draft article provided as follows:

> "The State is responsible for the injuries caused to an alien who has been expelled from the country, if the expulsion order was not based on grounds specified in municipal law or if, in the execution of the order, serious irregularities were committed in the procedure established by municipal law."[1978]

A. Forms of reparation

960. The fundamental principle governing the full reparation which must be made by a State for the injury caused by an internationally wrongful act is addressed in the State responsibility articles. Article 31 provides as follows:

[1975] The text of the articles on the Responsibility of States for internationally wrongful acts was adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10).

[1976] See articles 28-54.

[1977] See article 1 of the Commission's articles on State responsibility ("*Responsibility of a State for its internationally wrongful acts* – Every internationally wrongful act of a State entails the international responsibility of that State.") and article 38, para. 1 (a), (b) and (c) of the Statute of the International Court of Justice.

[1978] See International responsibility, note 605 above, article 5, para. 1.

"Article 31

Reparation

"1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

"2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

961. The different forms of reparation for an internationally wrongful act, namely, restitution, compensation and satisfaction, are enumerated in the State responsibility articles. Article 34 provides as follows:

"Article 34

Forms of reparation

"Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

1. Restitution

962. Restitution as a form of reparation is addressed in the State responsibility articles. Article 35 provides as follows:

"Article 35

Restitution

"A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) Is not materially impossible;

(*b*) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

963. Restitution does not appear to have been frequently awarded as a form of reparation in case of unlawful expulsion. It may be reasonable to consider this form of reparation only in cases in which the expulsion of the alien is unlawful rather than the manner in which the expulsion is carried out.

964. In this regard, the Special Rapporteur, Mr. García Amador, indicated that: "In cases of arbitrary expulsion, satisfaction has been given in the form of the revocation of the expulsion order

and the return of the expelled alien."[1979] Mr. García Amador referred in this context to the cases of *Lampton* and *Wiltbank* (United States citizens expelled from Nicaragua in 1894) and to the case of four British subjects who had also been expelled from Nicaragua.[1980]

965. The right to return in case of an unlawful expulsion has been recognized by the Inter-American Commission on Human Rights in a case involving the arbitrary expulsion of a foreign priest. The Commission resolved:

> "The Inter-American Commission on Human Rights resolves: [...] 3. To recommend to the government of Guatemala: a) that Father Carlos Stetter be permitted to return to the territory of Guatemala and to reside in that country if he so desires; b) that it investigates the acts reported and punish those responsible for them; and c) that it inform the Commission in 60 days on the measures taken to implement these recommendations."[1981]

966. With respect to migrant workers and members of their families, attention may be drawn to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Convention provides that an expulsion decision which is subsequently annulled cannot be used to prevent the person concerned from re-entering the expelling State. Article 22, paragraph 5, provides as follows:

> "If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned."

2. Compensation

967. Compensation as a form of reparation is addressed in the State responsibility articles. Article 36 provides as follows:

> "Article 36
>
> Compensation

[1979] International responsibility, note 605 above, p. 26, para. 99.

[1980] Ibid., para. 99, note 159. These cases are mentioned in John Basset Moore, *A Digest of International Law*, Washington, Government Printing Office, vol. IV, 1906, pp. 99-101. In the case of Lampton and Wiltbank, the Nicaraguan Government expelled two American citizens and subsequently permitted them to return upon request of the United States. In the case of the four British subjects expelled from Nicaragua, Great Britain demanded of Nicaragua "the unconditional cancellation of the decrees of expulsion", to which Nicaragua replied that "there was no occasion for the revocation of the decree of expulsion, as all the persons guilty of taking part in the Mosquito rebellion had been pardoned".

[1981] Inter-American Commission on Human Rights, Resolution 30/81, Case 73/78 (Guatemala), 25 June 1981, *Annual Report of the Inter-American Commission on Human Rights 1980-1981*, OEA/Ser.L/V/II.54, doc. 9 rev. 1, 16 October 1981, operative paragraph 3.

> "1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
>
> "2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."

968. Compensation is a well-recognized means of reparation for the damage caused by an unlawful expulsion to the alien expelled or to the State of nationality.[1982]

969. Damages have been awarded by several arbitral tribunals to aliens who had been victims of unlawful expulsions. In the *Paquet Case,* the umpire held that given the arbitrary nature of the expulsion enforced by the Government of Venezuela against Mr. Paquet, compensation was due to him for the direct damages he had suffered therefrom:

> "[…] the general practice amongst governments is to give explanations to the government of the person expelled if it asks them, and when such explanations are refused, as in the case under consideration, the expulsion can be considered as an arbitrary act of such a nature as to entail reparation, which is aggravated in the present case by the fact that the attributes of the executive power, according to the Constitution of Venezuela, do not extend to the power to prohibit the entry into the national territory, or expelling therefrom the domiciled foreigners whom the Government suspects of being prejudicial to the public order; That, besides, the sum demanded does not appear to be exaggerated. Decides that this claim of Mr. Paquet is allowed for 4,500 francs."[1983]

970. Damages were also awarded by the umpire in the *Oliva Case* to compensate the loss resulting from the break of a concession, although these damages were limited to those related to the expenditures which the alien had incurred and the time he had spent in order to obtain the contract.[1984] Commissioner Agnoli had considered that the arbitrary nature of the expulsion would have justified by itself a demand for indemnity:

[1982] See generally Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 278-280. "An expulsion without cause or based on insufficient evidence has been held to afford a good title to indemnity." Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 57. "Expulsion which causes specific loss to the national state receiving groups without adequate notice would ground a claim for indemnity as for incomplete privilege." Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 499.

[1983] *Paquet Case (Expulsion)*, Mixed Claims Commission Belgium-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. IX, pp. 323-325, at p. 325 (Filtz, Umpire).

[1984] *Oliva Case*, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 600-609, at pp. 608-610 (Ralston, Umpire), containing details about the calculation of damages in the particular case.

> "[…] [A]n indemnity of not less than 40,000 bolivars should be conceded, independently of any sum which might justly be found due him for losses resulting from the arbitrary rupture of the contract aforementioned, since there can be no doubt that, even had he not obtained the concession referred to, the sole fact of his arbitrary expulsion would furnish sufficient ground for a demand of indemnity."[1985]

971. In other cases, it was the unlawful manner in which the expulsion had been enforced (including the duration and conditions of a detention pending deportation) that gave rise to compensation. In the *Maal Case*, the umpire awarded damages to the claimant because of the harsh treatment he had suffered. Given that the individuals who had carried out the deportation had not been sanctioned, the umpire considered that the sum awarded needed to be sufficient in order for the State responsible to "express its appreciation of the indignity" inflicted to the claimant:

> "The umpire has been taught to regard the person of another as something to be held sacred, and that it could not be touched even in the lightest manner, in anger or without cause, against his consent, and if so done it is considered an assault for which damages must be given commensurate with the spirit and the character of the assault and the quality of the manhood represented in the individual thus assaulted. […] And since there is no proof or suggestion that those in discharge of this important duty of the Government of Venezuela have been reprimanded, punished or discharged, the only way in which there can be an expression of regret on the part of the Government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefor in the way of money compensation. This must be of a sufficient sum to express its appreciation of the indignity practiced upon this subject and its high desire to fully discharge such obligation. In the opinion of the umpire the respondent Government should be held to pay the claimant Government in the interest of and on behalf of the claimant, solely because of these indignities the sum of five hundred dollars in gold coin of the United States of America, or its equivalent in silver at the current rate of exchange at the time of the payment; and judgment may be entered accordingly."[1986]

972. In the *Daniel Dillon* case, damages were awarded to compensate maltreatment inflicted on the claimant due to the long period of detention and the conditions thereof:

> "The long period of detention, however, and the keeping of the claimant *incommunicado* and uninformed about the purpose of his detention, constitute in the opinion of the Commission a maltreatment and a hardship unwarranted by the purpose of the arrest and amounting to such a degree as to make the United Mexican States responsible under international law. And it is found that the sum in which an award should be made, can be properly fixed at $2500, U.S. currency, without interest".[1987]

[1985] Ibid., p. 602 (Agnoli, Commissioner).

[1986] *Maal Case*, Mixed Claims Commission Netherlands-Venezuela, 1 June 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 730-733, at pp. 732-733 (Plumley, Umpire).

[1987] *Daniel Dillon*, note 1657 above, p. 369.

973. In the *Yeager* case, the Iran-United States Claims Tribunal awarded the claimant compensation for (1) the loss of personal property that he had to leave behind because he had not been given sufficient time to leave the country;[1988] and (2) for the money seized at the airport by the "Revolutionary Komitehs".[1989]

974. In some instances, the European Court of Human Rights allocated a sum of money as compensation for non-pecuniary damages resulting from an unlawful expulsion. In the *Case of Moustaquim v. Belgium*, the Court disallowed a claim for damages based on the loss of earnings resulting from an expulsion which had violated article 8 of the European Convention on Human Rights. In this respect, the Court noted the absence of a causal link between the violation and the alleged loss of earnings. However, the Court awarded the applicant, on an equitable basis, 100,000 Belgian francs as a compensation for non-pecuniary damages resulting from having to live away from his family and friends, in a country where he did not have any ties.[1990]

975. In the *Case of Conka v. Belgium*, the European Court of Human Rights allowed the sum of 10,000 euros to compensate non-pecuniary damages resulting from a deportation which had violated articles 5, paragraphs 1 and 4 of the European Convention on Human Rights (right to liberty and security), article 4 of Protocol No. 4 to that Convention (prohibition of collective expulsion), as well as article 13 of the Convention (right to an effective remedy) taken in conjunction with article 4 of Protocol No. 4.[1991]

3. Satisfaction

976. Satisfaction as a form of reparation is addressed in the State responsibility articles. Article 37 provides as follows:

> "Article 37
>
> Satisfaction
>
> "1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
>
> "2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

[1988] *Yeager v. The Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of 2 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17, pp. 92-113, at pp. 107-109, paras. 51-59.

[1989] Ibid., p. 110, paras. 61-63.

[1990] European Court of Human Rights, *Case of Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, Application No. 12313/86, paras. 52-55.

[1991] European Court of Human Rights, *Case of Conka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, Application No. 51564/99, para. 89.

> "3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."

According to the Commission's commentary to this provision:

> "One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal."[1992]

977. Satisfaction as a form of reparation may be applied in case of unlawful expulsion.[1993] In particular, satisfaction has been applied as a form of reparation for an unlawful expulsion in situations where the expulsion order had not yet been enforced. In such cases, the European Court of Human Rights considered that a judgment determining the unlawfulness of the expulsion order was an appropriate form of satisfaction and, therefore, abstained from awarding non-pecuniary damages. Attention may be drawn in this respect to the *Case of Beldjoudi v. France,*[1994] the *Case of Chahal v. United Kingdom,*[1995] and the *Case of Ahmed v. Austria.*[1996]

[1992] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), commentary to article 37, para. 6.

[1993] "As Secretary Root declared in 1907, 'The right of a government to protect its citizens in foreign parts against a harsh and unjustified expulsion must be regarded as a settled and fundamental principle of international law. It is no less settled and fundamental that a government may demand satisfaction and indemnity for an expulsion in violation of the requirements of international law.'" Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, vol. 1, 2nd rev. ed., Boston, Little Brown and Company, 1947, p. 231 (quoting Communication to the Minister in Caracas, Feb. 28, 1907, For. Rel. 1908, 774, 776, Hackworth, Dig., III, 690).

[1994] European Court of Human Rights, *Case of Beldjoudi v. France,* Judgment (Merits and Just Satisfaction), 26 March 1992, Application No. 12083/86, para. 86: "The applicant must have suffered non-pecuniary damages, but the present judgment provides them with sufficient compensation in this respect". The Court then held that there would be a violation of article 8 of the Convention "in the event of the decision to deport Mr. Beldjoudi being implemented" (operative paragraph 1).

[1995] European Court of Human Rights, *Case of Chahal v. United Kingdom,* Judgment (Merits and Just Satisfaction), 15 November 1996, Application No. 22414/93, para. 158: "In view of its decision that there has been no violation of Article 5, para. 1 […], the Court makes no award for non-pecuniary damages in respect of the period of time Mr Chahal has spent in detention. As to the other complaints, the Court considers that the findings that his deportation, if carried out, would constitute a violation of Article 3 and that there have been breaches of Articles 5 para. 4 and 13 constitute sufficient just satisfaction."

[1996] European Court of Human Rights, *Case of Ahmed v. Austria,* Judgment (Merits and Just Satisfaction), 17 December 1996, Application No. 25964/94. The Court disallowed a claim for compensation for loss of earnings because of the lack of connection between the alleged damages and the conclusion of the Court with regard to article 3 of the Convention (para. 50). The Court then said: "The Court considers that the applicant must have suffered non-pecuniary damage but that the present judgment affords him sufficient compensation in that respect" (para. 51). The Court finally held: "[…] for as long as the applicant faces a real risk of being subjected in Somalia to treatment contrary to Article 3 of the Convention there would be a breach of that provision in the event of the decision to deport him there being implemented." (operative paragraph 2).

B. Burden of proof

978. The question of the burden of proof with respect to an allegedly wrongful expulsion appears to be unclear as a matter of international law. The question of the burden of proof has been addressed in some arbitral awards, although not in a uniform manner. As discussed previously, one of the requirements for a lawful expulsion is that the latter be based on a ground which is valid according to international law.[1997] Some instances of practice support the view that normally the expelling State has a duty to give the reasons for an expulsion. [1998]

979. In the *Oliva Case*, the Italian Commissioner put the burden of proof of the facts justifying the expulsion on the expelling State:

> "The Venezuelan Commissioner finds that Mr. Oliva has not proved his innocence. It is not his place to prove this innocence. Every man is considered innocent until the proof of the contrary is produced. It was therefore the Venezuelan Government that should have proved that the claimant was guilty and this is just what it has not done. When expulsion is resorted to in France or Italy the proofs are at hand. Mere suspicions may justify measures of surveillance, but never a measure so severe as that of forbidding the residence in a country of a man who has important interests therein."[1999]

980. In contrast, the Venezuelan Commissioner was of the view that it was sufficient that the expelling State had *well-founded reasons to believe* that the alien concerned was a revolutionist:

> "As to how far it was ascertained that Oliva was a revolutionist is not a matter for discussion. It was sufficient that there existed well-founded reasons in order that the Government of Venezuela might so believe, and this appears to be proved".[2000]

981. In the *Zerman Case*, the umpire considered that, in a situation in which there was no war or disturbance, the expelling State had the obligation of proving charges before the Commission, and that mere assertions could not be considered as sufficient:

> "The umpire is of opinion that, strictly speaking, the President of the Republic of Mexico had the right to expel a foreigner from its territory who might be considered dangerous, and that during war or disturbances it may be necessary to exercise this right even upon bear suspicion; but in the present instance there was no war, and reasons of safety could not be put forward as a ground for the expulsion of the claimant without charges preferred

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[1997] *See* Part VII.A.1.

[1998] *See* Part VII.A.3 and Part VIII.B.8(b).

[1999] *Oliva Case*, Mixed Claims Commission Italy-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, vol. X, pp. 600-609, at p. 607 (Agnoli, Commissioner).

[2000] Ibid., p. 605 (Zuloaga, Commissioner).

> against him or trial; but if the Mexican Government had grounds for such expulsion, it was at least under the obligation of proving charges before the commission. Its mere assertion, however, or that of the United States consul in a dispatch to his government, that the claimant was employed by the imperialist authorities does not appear to the umpire to be sufficient proof that he was so employed or sufficient ground for his expulsion."[2001]

982. In contrast, the Iran-United States Claims Tribunal has imposed the burden of proof on the claimant alleging wrongful expulsion. In *Rankin vs. The Islamic Republic of Iran,* the Tribunal concluded that the claimant had failed to do so and therefore dismissed his claims:

> "A claimant alleging expulsion has the burden of proving the wrongfulness of the expelling State's action, in other words that it was arbitrary, discriminatory, or in breach of the expelling State's treaty obligations."[2002]
>
> "The Tribunal notes that the Claimant bears the burden of proving that he was wrongfully expelled from Iran by acts attributable to the Government of Iran. In the absence of any explanation of this conflicting evidence, the Tribunal concludes that the Claimant has failed to prove his intention."[2003]
>
> "Consequently, the Tribunal finds that the Claimant has not satisfied the burden of proving that the implementation of the new policy of the Respondent […] was a substantial causal factor in the Claimant's decision to leave."[2004]

983. With respect to the *Rankin* case, however, it should be noted that the main issue was not whether there were grounds for the expulsion of Mr. Rankin, but whether the claimant had been "constructively" expelled or had left the territory of the Islamic Republic of Iran voluntarily.[2005]

[2001] J. N. Zerman v. Mexico, in John Bassett Moore, History and Digest of the International Arbitrations to which the United States has been Party, vol. IV, Washington, Government Printing Office, 1898, p. 3348.

[2002] *Rankin v. The Islamic Republic of Iran*, note 136 above, p. 142, para. 22.

[2003] Ibid., p. 151, para. 38.

[2004] Ibid., p. 151, para. 39.

[2005] *See* Part III.C.1(a).

XII. COLLECTIVE EXPULSION AND MASS EXPULSION

A. Introduction

984. The preliminary consideration of relevant issues and materials contained in this Part of the study is primarily intended to assist the Commission in determining whether the scope of the present topic should be limited to individual expulsions or be extended to include collective and mass expulsions.

985. There has been a lack of clarity and precision with respect to the consideration of the rules of international law relating to the collective expulsion and the mass expulsion of aliens. The terms "collective expulsion" and "mass expulsion" are sometimes used interchangeably notwithstanding the possible distinctions between the two situations. In the first case, the expulsion of even a relatively small number of aliens may violate the prohibition of collective expulsion if the expulsion of each alien is not considered on an individual case-by-case basis. The collective character of the expulsion of a group of aliens as such is the essential element of the prohibition of collective expulsion. In the second case, the expulsion of a large number of persons may constitute a violation of the prohibition of mass expulsion. In theory, the prohibition of mass expulsion may be violated even in situations in which the expulsion of individual aliens has been considered on a case-by-case basis. However, as a practical matter, such consideration is less likely in situations involving the expulsion of large numbers of persons. Nevertheless, the quantitative character of the expulsion of a large number of aliens appears to be the essential element of the notion of *mass* expulsion (as opposed to *collective* expulsion).

986. The collective expulsion of a group of aliens or the mass expulsion of a large number of aliens may occur with respect to aliens who have some common characteristic or are members of a particular group. The collective or mass expulsion of aliens on discriminatory grounds, such as race, may violate not only the prohibition of collective or mass expulsion but also the principle of non-discrimination.[2006] This type of unlawful discriminatory expulsion may be viewed as an aggravated form of the violation of the prohibition of collective or mass expulsion. However, the discriminatory ground is not necessarily required for the prohibition of either collective expulsion or mass expulsion.

B. Individual expulsion, collective expulsion and mass expulsion

987. There are fundamental distinctions between the expulsion of one or more individual aliens, the collective expulsion of a group of aliens and the mass expulsion of a large number of aliens.

1. Individual expulsion

988. The function of the expulsion of an alien is to compel the departure of the alien if his or her presence is contrary to the interests of the territorial State. The general limitations on the expulsion of

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[2006] The expulsion of an individual alien may also violate the principle of non-discrimination and therefore constitute a violation of international law as discussed in Parts VI.B.2; VII.A.7; VII.B.6; and VIII.B.1.

individual aliens under traditional as well as contemporary international law address the determination of this essential question by a State in relation to a particular individual. The grounds and other factors affecting the expulsion of aliens, the procedural requirements for the expulsion of aliens and the rules relating to the implementation of the expulsion decision are all intended to be applied with respect to a particular alien on a case-by-case basis.

989. The view has been expressed that it may be difficult to distinguish between the individual expulsion of a large number of aliens and the collective expulsion of a group of aliens as such.[2007] The fact that a number of individuals are subject to expulsion on the same day or within a short period of time does not render these expulsions a collective expulsion as long as the case for the expulsion of each and every alien was considered on an individual basis. The expulsion of one or more or even all of these individuals may fail to comply with some or all of the requirements for lawful expulsion discussed in Parts VI to IX (or Part X in the case of specific categories of aliens). A pattern of unlawful violations would be a cause for greater concern. However, the unlawfulness of a series of individual expulsions would not change the character of such expulsions from the expulsion of a number of individual aliens to a collective expulsion. Each individual expulsion would constitute a violation of the rules of international law which govern the expulsion of individual aliens as discussed in Parts VI to X.

2. Collective expulsion

990. In contrast, the collective expulsion of a group of aliens does not take into account the consequences of the presence, the grounds and other factors affecting the expulsion, the procedural requirements for the expulsion or the rules relating to the implementation of the expulsion decision with respect to a single one of these aliens. The decision concerning expulsion is made with respect to the group of aliens as a whole. The procedure is conducted with respect to the group of aliens as a whole. The implementation of the decision is carried out with respect to the group of aliens as a whole. The collective expulsion of a group of aliens cannot, by definition, comply with the limitations or requirements that apply to the expulsion of an individual alien. In theory, the prohibition of collective expulsion could be violated by expelling a small group of aliens (e.g. two or more) who did not receive individual consideration of their case. In practice, collective expulsion has usually occurred in relation to several aliens.

991. The aliens who are members of the group which is subject to collective expulsion usually have some common characteristic which identifies them or unifies them as members of a group. Thus, the prohibition of collective expulsion may contain a discriminatory element in recognition of the practical significance of such an element as well as the particularly egregious nature of a collective expulsion which also violates the principle of non-discrimination. However, this additional element is not essential to the prohibition of collective expulsion as a violation of international law. In fact, a

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[2007] "Often it may not be easy to distinguish the expulsion of many individuals from the collective expulsion of a group of individuals." Karl Doehring, "Aliens, Expulsion and Deportation", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at p. 111.

State may violate the prohibition of collective expulsion without discriminating against any of the individuals concerned on grounds that would be prohibited by international law. Such would be the case if a State decided to expel collectively all the individuals who participated in a riot, without examining the seriousness of the offence committed by each individual, the specific role that he or she assumed in the riot or the impact of the expulsion on his or her particular situation (e.g. on his or her family life).

992. Furthermore, it is important to note that the consideration of the membership of an individual in a group or the conduct of an individual in relation to a group as a ground for the expulsion of this individual would not violate as such the prohibition of collective expulsion. An example of such a situation would be the expulsion of an individual based on his or her membership in a criminal organization or an organization whose activities are detrimental to the interests of the State. In such a case, the expulsion of the individual on grounds relating to his or her membership in a group would still constitute an individual expulsion based on the consideration of the case of a particular alien as a consequence of his or her own conduct.

3. Mass expulsion

993. The mass expulsion of aliens is generally considered to involve a large number of persons.[2008] This quantitative element distinguishes mass expulsion from individual expulsion as well as collective expulsion. There is no commonly agreed threshold concerning the number of aliens required for the expulsion of numerous aliens to constitute mass expulsion.[2009] State practice may provide some guidance in this respect.

994. The absence of the consideration of the expulsion of aliens on an individual case-by-case basis which is the fundamental distinction between individual expulsion and collective expulsion is not necessarily an essential element of the definition of mass expulsion or the prohibition of mass expulsion. If this element of the collective determination of the expulsion of a group of aliens *as such* is present, then the mass expulsion may be viewed as constituting an excessive violation of the prohibition of collective expulsion. However, mass expulsion may be prohibited even in the absence of this element of collectivity, for example, in situations in which a mass expulsion would impose an excessive burden on the receiving States in violation of international law. In such cases and depending on the circumstances, the expelling State may violate the prohibition of abuse of rights[2010] in expelling a large number of aliens at the same time or within a limited period of time.

[2008] See, e.g., Jean-Marie Henckaerts, "The Current Status and Content of the Prohibition of Mass Expulsion of Aliens" in *Human Rights Law Journal*, vol. 15, No. 8-10, 30 November 1994, pp. 301-317, at p. 301 ("In its ordinary meaning, mass expulsion, as opposed to individual expulsion, refers to the expulsion of a large group of people.").

[2009] "There is no absolute answer as to what size group constitutes a mass and what does not. In international law, this dead end has been avoided by providing qualitative, not quantitative, standards, as is more adequately reflected in the term collective expulsion." Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice*, The Hague, Martinus Nijhoff Publishers, 1995, p. 1.

[2010] *See* Part VI.A.1.

995. The mass expulsion of enemy aliens who are nationals of an opposing State during an armed conflict may be permissible if the minimum standards of humanitarian law and human rights law are met. As discussed previously, the Eritrea-Ethiopia Claims Commission upheld the right of a State to expel all enemy aliens during an armed conflict. Nevertheless, the Commission considered whether the protection provided by international humanitarian law and human rights law was respected in relation to individual aliens to the extent possible during an armed conflict.[2011] Thus, there would appear to be no exception to the prohibition of the collective expulsion of a group of aliens as such even in time of armed conflict.

C. Collective expulsion

996. Collective expulsion is explicitly prohibited by a number of human rights treaties, including the American Convention on Human Rights, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[2012]

997. The American Convention on Human Rights expressly prohibits the collective expulsion of aliens. Article 22, paragraph 9, provides as follows:

> "The collective expulsion of aliens is prohibited."

998. The Declaration of San José on Human Rights adopted at the Inter-American Specialized Conference on Human Rights in 1969 contains the same prohibition. Article 22, paragraph 9, provides as follows:

> "The collective expulsion of aliens is prohibited."[2013]

999. More recently, the prohibition of collective expulsion was reiterated in the Santiago Declaration on Migratory Principles, adopted by the Ministries of Interior of Mercosur and Associates States in 2004.[2014]

[2011] *See* Part X.H (in particular, 2(b), 4 and 5).

[2012] "Various international instruments enshrine the principle that the collective expulsion of aliens is prohibited". Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, Protection Policy and Legal Advice Section, Department of International Protection, UNHCR, Geneva, 4 September 2003 (including Annex A), p. 42.

[2013] Signed at the Inter-American Specialized Conference on Human Rights (San José, Costa Rica, 22 November 1969).

[2014] Santiago de Chile, 17 May 2004 (www.digemin.gob.pe/f_home_digemin.asp?cpd=385). The declaration contains a paragraph condemning "xenophobic practices, mass or collective deportations, and detentions with no legal basis". [Spanish original.]

1000. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms also expressly prohibits collective expulsion. Article 4 provides as follows:

> "Collective expulsion is prohibited."

1001. In interpreting article 4 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights has distinguished between the collective expulsion of aliens and the expulsion of one or more individual aliens as follows:

> "The Court finds that collective expulsion is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group. Moreover, the fact that a number of aliens receive similar decisions does not lead to the conclusion that there is a collective expulsion when each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis ..."[2015]

1002. The European Court of Human Rights has confirmed the distinction between collective expulsion and individual expulsion in its subsequent case-law:

> "The Court reiterated its case-law whereby collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group (...). That does not mean, however, that where the latter condition is satisfied the background to the execution of the expulsion order plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4."[2016]
>
> "In short, at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion did the procedure afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into consideration".[2017]

[2015] *Case of Vedran Andric v. Sweden*, Decision as to the Admissibility of Application No. 45917/99, para. 1 (The Law). Applying these criteria, the Court found the application manifestly ill-founded. See also *Becker v. Denmark*, Decision of the European Commission of Human Rights as to the Admissibility of Application 7011/75, 19 Y.B. Eur. Conv. on H.R. 416, 454 (1976) .

[2016] *Case of Conka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, para. 59.

[2017] *Case of Conka v. Belgium*, Judgment (Merits and Just Satisfaction), 5 February 2002, para. 63.

1003. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families expressly prohibits the collective expulsion of such individuals. Article 22, paragraph 1, provides as follows:

> "Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually."

1004. Collective expulsion is implicitly prohibited by other human rights treaties which limit the expulsion of aliens to individual cases, including the International Covenant on Civil and Political Rights and the Protocol to the European Convention on Establishment.

1005. Article 13 of the International Covenant on Civil and Political Rights does not contain an explicit prohibition of collective expulsion. However, the Human Rights Committee has expressed the view that such expulsion would be contrary to the procedural guarantees for individual aliens. In its General Comment No. 15 concerning the position of aliens under the Covenant, the Human Rights Committee stated as follows:

> "Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out "in pursuance of a decision reached in accordance with law", its purpose is clearly to prevent arbitrary expulsions. *On the other hand, it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions.* This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when 'compelling reasons of national security' so require. Discrimination may not be made between different categories of aliens in the application of article 13."[2018] [Emphasis added.]

1006. The Protocol to the European Convention on Establishment implicitly prohibits collective expulsion by providing that a State may exercise its right of expulsion with respect to aliens only in individual cases. Section III c of the Protocol provides as follows:

> "The right of expulsion may be exercised only in individual cases."

1007. The Charter of Fundamental Rights of the European Union explicitly prohibits collective expulsions. Article 19, paragraph 1, provides as follows:

> "Collective expulsions are prohibited."[2019]

[2018] Human Rights Committee, General Comment No. 15: The Position of Aliens under the Covenant, para. 10.

[2019] Charter of Fundamental Rights of the European Union, *Official Journal C-364*, 18 December 2000, pp. 1-22.

1008. The Committee on the Elimination of Racial Discrimination has also indicated that the collective expulsion of aliens should be prohibited. In its general recommendation XXX, the Committee recommended that States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination:

> "Ensure that non-citizens are not subject to collective expulsion in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account."[2020]

1009. The Special Rapporteur on the rights of non-citizens, David Weissbrodt, has also indicated that the collective expulsion of aliens, as a group, is prohibited in the absence of the consideration of each particular case. In his final report, the Special Rapporteur stated as follows:

> "Any measure that compels non-citizens, as a group, to leave a country is prohibited except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual non-citizen in the group."[2021]

D. Collective expulsion on discriminatory grounds

1010. The General Assembly has recognized that the individual or collective expulsion of aliens in violation of the principle of non-discrimination is prohibited. In the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, the General Assembly stated as follows:

> "Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited."[2022]

E. Mass expulsion

1011. Article 13 of the International Covenant on Civil and Political Rights does not contain an explicit prohibition of mass expulsion. As discussed previously, the Human Rights Committee has expressed the view that such expulsion would be contrary to the procedural guarantees for individual aliens.[2023] The Human Rights Committee has also held that the mass expulsion of Haitian workers from the Dominican Republic represented "a serious violation of several articles of the Covenant".[2024]

[2020] Committee on the Elimination of Racial Discrimination, note 1164 above, para. 26.

[2021] The rights of non-citizens, note 564 above, para. 11 (citing European Court of Human Rights, *Conka v. Belgium*, application No. 51564/99, 5 February 2002).

[2022] Resolution 40/144, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, 13 December 1985, para. 7.

1012. The prohibition of mass expulsion is explicitly stated in the Santiago Declaration on Migratory Principles, adopted by the Ministries of Interior of Mercosur and Associates States.[2025]

1013. In 1986, the International Law Association adopted the declaration of principles of international law on mass expulsion. The International Law Association took the position that the mass expulsion of illegal aliens must be carried out in conformity with international law. Principle 18 of the declaration provides as follows:

> "Mass expulsion of 'undocumented' or illegal workers or aliens must also be carried out in full conformity with applicable ILO and other international instruments, as well as customary international law."[2026]

F. Mass expulsion on discriminatory grounds

1014. The African Charter on Human and Peoples' Rights prohibits mass expulsion on certain grounds which are contrary to the principle of non-discrimination. Article 12, paragraph 5, provides as follows:

> "The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups."

1015. The African Commission on Human and Peoples' Rights has emphasized that the mass expulsion of aliens is discriminatory, cannot be justified based on economic considerations and is likely to violate numerous rights and guarantees set forth in the African Charter on Human and Peoples' Rights, including the right to challenge the measure before a competent authority.

[2023] Human Rights Committee, General Comment No. 15: The Position of Aliens under the Covenant, para. 10 quoted above.

[2024] Concluding observations of the Human Rights Committee: Dominican Republic, 25-26 March 1993, A/48/40 (vol. 1), paragraph 460 ("There have also been incidents of mass expulsions [of Haitian workers] from the country. In this regard, the Committee considers that Presidential Decree No. 233-91, which resulted in the mass deportation of Haitian workers under 16 and over 60 years of age, represents a serious violation of several articles of the Covenant").

[2025] Santiago de Chile, 17 May 2004, at www.digemin.gob.pe/f_home_digemin.asp?cpd=385. The declaration contains a paragraph condemning "xenophobic practices, mass or collective deportations and detentions with no legal basis."

[2026] International Law Association, declaration of principles of international law on mass expulsion, 62nd conference of the ILA, Seoul, 24-30 August 1986, *Conference Report 1986*, pp. 17-18.

"14. Article 12 paragraph 4 stipulates that a non national legally admitted in a territory of a State party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law. Paragraph 5 of the same article stipulates that 'the mass expulsion of non nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.'

"15. In communication 71/92 cited here above, the Commission indicated that mass expulsion was a special threat to human rights. A government action specially directed at specific national, racial ethnic or religious groups is generally qualified as discriminatory in the sense that, none of its characteristics has any legal basis or could constitute a source of particular incapacity.

"16. The Commission concedes that African States in general and the Republic of Angola in particular are faced with many challenges, mainly economic. In the face of such difficulties, States often resort to radical measures aimed at protecting their nationals and their economic from non-nationals. Whatever, the circumstances may be however, such measures should not be taken at the detriment of the enjoyment of human rights. Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations 'constitute a special violation of human rights'.

"17. This type of deportations calls into question a whole series of rights recognized and guaranteed in the Charter; such as the right to property (article 14), the right to work (article 15), the right to education (article 17 paragraph 1) and results in the violation by the State of its obligations under article 18 paragraph 1 which stipulates that 'the family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health'. By deporting the victims, thus separating some of them from their families, the defendant State has violated and violates the letter of this text.

"18. Article 2 of the Charter emphatically stipulates that 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.' This text obligates States Parties to ensure that persons living on their territory, be they their nationals or non nationals, enjoy the rights guaranteed in the Charter. In this case, the victims rights to equality before the law were trampled on because of their origin.

"19. It emerges from the case file that the victims did not have the opportunity to challenge the matter before the competent jurisdictions which should have ruled on their detention, as well as on the regularity and legality of the decision to expel them by the Angolan government. Consequently, Article 7, paragraph 1 (a) of the Charter.

"20. The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is however of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case

> before the competent national courts as this is contrary to the spirit and letter of the Charter and international law. […]"[2027]

1016. The Special Rapporteur on the rights of non-citizens, David Weissbrodt, also indicated that the mass expulsion of aliens which violates the principle of non-discrimination constitutes a human rights violation based on the jurisprudence of the African Commission on Human and Peoples' Rights. In his final report, the Special Rapporteur stated as follows:

> "Mass expulsions on the basis of nationality, religion, ethnic, racial or other considerations constitute human rights violations."[2028]

1017. The International Law Association has expressed the view that mass expulsion is prohibited, *inter alia*, when it is arbitrary or discriminatory, serves as a pretext for an unlawful aim, is contrary to the principles of good faith, proportionality and justifiability, or to basic human rights. The Declaration of principles of international law on mass expulsion, principle 17, states as follows:

> "Mass expulsion of aliens, whether long-term residents, migrant workers, stateless persons or irregular asylum seekers, must not be arbitrary or discriminatory in its application, or serve as a pretext for genocide, confiscation of property or reprisal. The power of expulsion must be exercised in conformity with the principles of good faith, proportionality and justifiability, with due regard to the basic human rights of the individual concerned."[2029]

G. Possible exceptions to the prohibition of mass expulsion

1018. There may be exceptional situations in which the expulsion of a large number of aliens is permitted notwithstanding the prohibition of mass expulsion.

1. Former nationals of a State whose territory has changed

1019. Attention may be drawn to the arbitral awards given in 1924 in the case *Affaire relative à l'acquisition de la nationalité polonaise*, which dealt with the case of residents who had become foreigners as a result of a territorial change. The arbitrator held:

> "It should be admitted, on the other hand, that the receiving State normally has the right to demand the emigration of those inhabitants of the ceded territory who have opted for

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[2027] African Commission on Human and Peoples' Rights, note 368 above, paras. 14-20 (citations omitted).

[2028] The rights of non-citizens, note 460 above, footnote 27 (citing African Commission on Human and Peoples' Rights, *Fédération internationale des Ligues des droits de l'homme v. Angola*, communication No. 159/96 (not dated), and *Rencontre africaine pourla défense des droits de l'homme v. Zambia*, communication No. 71/92 (not dated)).

[2029] International Law Association, Declaration of principles of international law on mass expulsion, 62nd conference of the ILA, Seoul, 24-30 August 1986, *Conference Report 1986*, pp. 17-18.

the nationality of the ceding State. This principle, which has been forged by international practice, and which is expressly recognized by the most learned authors, forms the very basis of the provisions concerning such an option, which have been inserted into recent peace treaties The elimination of this right, in the instant case, would be so exceptional that it cannot be presumed."[2030]

2. Enemy nationals during an armed conflict

1020. As discussed previously, a State has the right to expel all enemy aliens who are nationals of an opposing State during an armed conflict. This right is an exception to the prohibition of mass expulsion. However, the expulsion of individual enemy aliens must comply with the relevant principles of international humanitarian law and international human rights law which are applicable in time of armed conflict to the extent possible under these exceptional circumstances.[2031]

[2030] *Affaire relative à l'acquisition de la nationalité polonaise (Allemagne contre Pologne)*, décision du 10 juillet 1924, Reports of International Arbitral Awards, vol. I, p. 401, at 426-427 [translated by the Secretariat: French original: «[i]l faut admettre, d'autre part, qu'un Etat cessionnaire a normalement le droit d'exiger l'émigration des habitants du territoire cédé qui ont opté en faveur du pays cédant. Ce principe, consacré par la pratique internationale, et expressément admis par les meilleurs auteurs, se trouve à la base même des dispositions concernant l'option insérées dans les récents traités de paix. La suppression de ce droit, en l'espèce, aurait un caractère suffisamment exceptionnel pour qu'on ne puisse la présumer.»]

[2031] *See* Part X.H (in particular, 2(b), 4 and 5).

Annex I

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Annex II

List of abbreviations: national legislation

State	Abbreviation	National legislation
Argentina	2004 Act	Act No. 25,871 ("Immigration Act")
Australia	1958 Act	Migration Act 1958 (as amended through Act. No. 144 of 2005)
Austria	2005 Act	Federal Act on the granting of asylum (2005 Asylum Act), and Federal Act on the Policing of Aliens, the Issuance of Documents to Aliens and the Granting of the Right of Entry (2005 Aliens Act) (combined Acts)
Belarus	1999 Council Decision	Regulations on Procedure of Deportation of Foreign Citizens and Persons without Citizenship in the Republic of Belarus, Decision of the Council of Ministers No. 1653
	1998 Law	Law on Immigration, No. 224-Z
	1996 Rules	Rules of Transit Journey of Foreign Journey of Foreign Citizens and Persons without Citizenship through the Territory of the Republic of Belarus, Decision of the Cabinet of Ministers No. 62
	1993 Law	Law on Legal Status of Foreign Citizens and Persons Without Citizenship in the Republic of Belarus, No. 2339-XII (as amended through No. 178-Z of 4 January, 2003)
Bosnia and Herzegovina	2003 Law	Law on Movement and Stay of Aliens and Asylum, BiH PA Number 79/03
Brazil	1981 Decree	Decree No. 86.715 of 10 December 1981
	1980 Law	Law No. 6.815 of August 1980
Bulgaria	1998 Law	Law for the Foreigners in the Republic in the Bulgaria, Prom. SG 153/23 Dec 1998 (as amended through SG 11, 1 February 2005)
Cameroon	2000 Decree	Decree No. 2000/286 specifying entry, stay and departure conditions for visitors to Cameroon
Canada	2001 Act	Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger (Statutes of Canada 2001, Chapter 27, 1 November 2001, First Session, Thirty-seventh Parliament, 49-50 Elizabeth II, 2001)

Chile	1975 Decree	Decree establishing laws relating to foreigners in Chile ("Extranjeria"), DL 1094
China	1982 Constitution	The Constitution of the People's Republic of China (1982)
	2005 Law	The Law of the People's Republic of China on Public Security Administration Penalties
	2003 Law	Administrative Measures for the Review and Approval of Permanent Residence in China for Foreigners
	1993 Law	The State Security Law of the People's Republic of China
	1986 Law	The Law of the People's Republic of China on the Control of the Entry and Exit of Aliens
	1978 Law	The Criminal Law of the People's Republic of China (as amended through 28 February 2005)
	1986 Rules	Detailed Rules for the Implementation of the Law of the People's Republic of China on Control of the Entry and Exit of Aliens (as revised through 15 July 1994)
	2003 Provisions	Procedural Provisions for the Handling of Administrative Cases by Public Security Organs
	1998 Provisions	Procedural Provisions for the Handling Criminal Cases by Public Security Organs (as amended through 14 May 1998)
	1992 Provisions	Provisions on the Enforcement Procedure for the Compulsory Departure of Aliens
	2002 Circular	Circular of the General Office, Ministry of Justice, on the Publication of the Minutes of the Workshop on the Administration of Alien Offenders
	1987 Note	Note by the Ministry of Public Security on the Use of Alien Identity Cards, Application Forms and Visa Stamps
	Foreign Students Regulation	Regulation on the Administrative Control of Foreign Students
Colombia	1995 Decree	Decree 2268 of 22 December 1995 Concerning the Issuing of Visas, Including Diplomatic Visas
Croatia	2003 Law	Law Concerning Foreigners, No. 01-081-03-2443/2

Czech Republic	1999 Act	Act No. 326 of 30 November 1999 on Residence of Aliens in the Territory of the Czech Republic and Amendment to Some Acts (as amended through Act No. 140 Sb. of 3 April 2001)
Denmark	2003 Act	Consolidation Act No. 685 of 24 July 2003 of the Danish Ministry of Refugee, Immigration and Integration Affairs ("Aliens (Consolidation) Act")
Ecuador	2004 Law	Law Expediting the Codification of the Law Relating to Aliens (19 October 2004), Codification 2004-023
Finland	2004 Act	Aliens Act (301/2004) (as amended through amendment 653/2004)
France	Code	Code on the Entry and Stay of Aliens and on the Right to Asylum
Germany	Basic Law	Basic Law for the Federal Republic of Germany, 23 May 1949
	2004 Act	Residence Act (30 June 2004)
Greece	2001 Law	Law on Entry and Stay of Aliens in Greek Territory, Acquisition of Greek Citizenship by Naturalization and other Provisions, Law 2910/2001
Guatemala	1999 Regulation	Regulation on the Law of Migration (20 July 1999)
	1986 Decree Law	Decree Law No. 22-86 (Law on Migration and Aliens)
Honduras	2003 Act	Immigration and Aliens Act, No. 208-2003
Hungary	2001 Act	Act XXXIX of 2001 on the Entry and Stay of Foreigners
Iran (Islamic Republic of)	1973 Regulation	Regulation on the Implementation of the Act on Entry and Residency of Foreign Nationals in Iran (31 May 1973)
	1931 Act	Act on Entry and Residency of Foreign Nationals in Iran approved on 1 May 1931 (incorporating later amendments)
Italy	2005 Law	Law No. 155 (31 July 2005) on Legal Conversion, with Modifications, of Decree-Law 27 July 2005, No. 144, Bringing Urgent Measures for the Confronting of International Terrorism
	1998 Decree-Law No. 286	Decree-Law No. 286 (25 July 1998), Establishing a Unified Body of Laws on the Rules Concerning the Regulation of Immigration and Norms Concerning the Condition of the Alien

	1998 Law No. 40	Law No. 40 (6 March 1998) on the Control of Immigration and Norms Concerning the Condition of the Alien
	1996 Decree Law	Decree-Law No. 132 (19 March 1996), Urgent provisions relating to the governance of immigration and the regulation of entry into, and stay in, the national territory by citizens of countries not belonging to the European Union
Japan	1951 Order	Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of 1951 (as amended through Law No. 66 of 2005)
Kenya	1973 Act	Aliens Restriction Act (Entry into force 18 May 1973)
	1967 Act	Immigration Act (Entry into force 1 December 1967) (as amended through 1972)
Lithuania	2004 Law	Law on the Legal Status of Aliens, No. IX-2206
Madagascar	1994 Decree	Decree No. 94-652, Abrogating Decree No. 66-101 of 2 March 1966 and Establishing New Modalities for Application of Law No. 62-002 of 6 June 1962 on the Organization and Control of Immigration
	1962 Law	Law Establishing the Organization and Control of Immigration, No. 62-006 (6 June 1962)
Malaysia	1959-1963 Act	Immigration Act, 1959-1963
	1963 Regulations	Immigration Regulations 1963
Morocco	1934 Dahir	Dahir Relating to Immigration (Entry into force 15 November 1934)
Nigeria	1999 Constitution	Constitution of the Federal Republic of Nigeria (1999)
	1963 Act	Immigration Act of 1 August 1963 (Chapter 171)
	1963 Regulations (L.N. 94)	L.N. 94 of 1963, Immigration (Control of Aliens) Regulations under Section 51 (1 August 1963, with commencement 1 August 1963)
	1963 Regulations (L.N. 93)	L.N. 93 of 1963, Immigration Regulations under Section 51 (1 August 1963, with commencement 1 August 1963)
Norway	1988 Act	Act Concerning the Entry of Foreign Nationals into the Kingdom of Norway and Their Presence in the Realm (Immigration Act), No. 64 (24 June 1988) (as amended through Law 2005 06-10-50 with effect from 9 September 2005)

Panama	1980 Act	Act No. 6 of 5 March 1980
	1960 Decree-Law	Decree-Law of 5 July 1960 (as amended through Act No. 6 of 5 March 1980)
Paraguay	1996 Law	Law on Migration, No. 978
Peru	2002 Law	Law on Asylum, No. 27840
Poland	2003 Act No. 1776	Act of 13 June 2003 on Granting Protection to Aliens within the Territory of the Republic of Poland, Journal of Laws of 2003, No. 128, item 1176
	2003 Act No. 1775	Act on Aliens of 13 June 2003, Journal of Laws of 2003, No. 128, item 1175
Portugal	1998 Decree-Law	Decree-Law No. 244/98 (as amended through 12 March 2003)
Republic of Korea	1992 Act	Immigration Control Act (Act No. 4522 of 8 December 1992) (as amended through Act No. 7034 of 31 December 2003)
	1993 Decree	Enforcement Decree Of The Immigration Control Act, Wholly Amended by Presidential Decree No. 13872 (as amended through 17 August 2004)
Russian Federation	2002 Law No. 115-FZ	Federal Law on the Legal Position of Foreign Citizens in the Russian Federation, No. 115-FZ
	2002 Law No. 62-FZ	Federal Law on Citizenship of the Russian Federation, No. 62-FZ
	1996 Law	Federal Law of the Russian Federation on the Procedure for Exit from the Russian Federation and Entry Into the Russian Federation, No. 114-FZ
	Administrative Code, chapter 18	Russian Administrative Code, Chapter 18 ("Administrative Offenses Concerning the Protection of the State Border of the Russian Federation and Regime for Stay of Foreign Citizens or Persons Without Citizenship in the Territory of the Federation," Index: Code of Administrative Offenses, Division II, Chapter 18)
Slovenia	2003 Act	Aliens Act (Officially Revised Text), ZTUJ-1-UPB1
South Africa	2002 Act	Immigration Act, No. 13 of 2002 (as amended by the Immigration Amendment Act, No. 19 of 2004)

Spain	2000 Law	Organic Law 4/2000 (11 January 2000) Concerning the Rights and Liberties of Foreigners in Spain and Their Social Integration (as modified through Organic Law 14/2003, 20 November 2003)
Sudan	2003 Act	Nationality Act 2003
Sweden	1989 Act	Aliens Act (1989:529)
Switzerland	Federal Constitution	Federal Constitution of the Swiss Confederation (18 April 1999)
	1931 Federal Law	Federal Law of 26 March 1931 on the Stay and Residence of Foreigners (LSEE), No. 142.20
	1949 Regulation	Regulation of 1 March 1949 on Execution of the Federal Law on the Stay and Residence of Foreigners (RSEE), No. 142.201
	1999 Ordinance	Ordinance of 11 August 1999 on the Execution of Renvoi and the Expulsion of Foreigners (OERE), No. 142.281
	Penal Code	Swiss Penal Code of 21 December 1937, No. 311.0
	1909 Federal Decree	Federal Decree of 15 June 1909 Imposing on the Confederation Responsibility for the Costs of Returning Indigent Foreigners, No. 142.291
Tunisia	1968 Law	Law No. 1968-0007 of 8 March 1968, Relating to the Condition of Foreigners in Tunisia
United Kingdom	1999 Act	Immigration and Asylum Act 1999
	1993 Act	Asylum and Immigration Appeals Act 1993
	1981 Act	British Nationality Act 1981
	1978 Act	State Immunity Act 1978
	1972 Order	Immigration (Exemption from Control) Order 1972
	1971 Act	Immigration Act 1971
	Manual	Home Office Operational Enforcement Manual on Deportation
United States	INA	Immigration and Nationality Act, 8 U.S.C. (updated through 19 July 2005)